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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 764.

JAMES MONROE MACKIE, BENJAMIN STORY MACKIE, AND FERGUS MONROE MACKIE, LEGAL REPRESENTATIVES OF MRS. MARY E. STORY MACKIE, DECEASED, AND JOSEPH ANTHONY FERNANDEZ, TUTOR OF THE MINORS STORY, PLAINTIFFS IN ERROR,

VS.

BENJAMIN S. STORY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

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FILED OCTOBER 9, 1876.

Jan 13. 1877

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1 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

BENJ. S. STORY
versus
MARY ELIZABETH STORY MACKIE AND OTHERS. } No. 7430.

Transcript.—Filed June 2d, 1875.

State of Louisiana, second district court for the parish of Orleans.

SUCCESSION OF NORMAN STORY. } No. 37828.

Petition for letters, etc.—Filed March 3rd, 1875.

To the hon. the judge of the 2d district court in and for the parish of Orleans:

The petition of Benjamin S. Story, who resides in the city of New Orleans, respectfully represents that Norman Story, late a citizen
2 of the State of Louisiana and a resident of the city of New Orleans, departed this life at Pau, in the republic of France, on the 28th day of January, 1875; that decedent leaves heirs duly represented in the State, and an olographic last will and testament, which is herewith filed; and petitioner believes that he is the executor of the last will and testament of deceased, and is desirous of qualifying and of receiving letters of executorship.

Wherefore your petitioner prays that said olographic last will and testament be duly probated and registered, and that letters of executorship be delivered to him; and he further prays for general and equitable relief, &c.

(Signed) HAMPDEN STORY, *Atty.*

Affidavit.

Octave Hopkins, being duly sworn, deposes and says that Norman Story, formerly of this city, died near Pau, in France, on the twenty-eighth day of January, 1875.

(Signed) OCTAVE HOPKINS.

3 Sworn to and subscribed before me this 3d March, 1875.

(Signed) WM. H. HOLMES,
Second J. P., Parish Orleans, La.

Order.

Let the last will of the deceased be proved before me forthwith.

New Orleans, March 3rd, 1875.

(Signed) A. L. TISSOT, *Judge.*

Order.

Let the petitioner be confirmed as testamentary executor of the deceased, and let letters issue to him as such on his taking the oath prescribed by law.

New Orleans, March 5th, 1875.

(Signed) A. L. TISSOT, *Judge.*

Last will and testament.—Filed March 3rd, 1875.

SUCCESSION OF NORMAN STORY. } No. 37828.

Ne varietur. New Orleans, March 3rd, 1875.
(Signed) A. L. TISSOT, *Judge.*

NEW ORLEANS, *April 24th*, 1867.

4 I, Norman Story, of this city of New Orleans, of sound body and of sound mind, but having the uncertainty of life in view, do write this my last olographic will and testament, hereby expressly revoking all other wills and testaments by me written heretofore.

1st. I appoint my brother, Benjamin S. Story, to act as executor of this my last will (without security.)

2d. It is my wish that all my just debts shall be paid without delay.

3rd. I will and bequeath to Henry C. Story and Benj. S. Story all properties I die possessed of, to be divided equally between them.

This, my last olographic will and testament, I have entirely written and now proceed to sign, at this city of New Orleans, this the 24th day of April, 1867.

(Signed) NORMAN STORY.

Ne varietur. New Orleans, March 3rd, 1875.
(Signed) A. L. TISSOT, *Judge.*

5 *Proof of will.*

Be it remembered that on this third day of March, in the year of our Lord one thousand eight hundred and seventy-five, and the ninety-ninth year of the Independence of the United States of America, upon the application of Benjamin S. Story, and pursuant to my decree bearing even date herewith, before me, A. L. Tissot, judge of the second district court for the parish of Orleans, personally came and appeared Messrs. Octave Hopkins and B. S. Story, witnesses, who, being duly sworn, were by me presented with a sealed packet, sealed and closed with mucilage, and bearing the following superscription, to wit, "Olographic will of Norman Story," did declare and say that the said superscription is in the proper handwriting of the late Norman Story.

Whereupon, the said sealed packet being by me broken open, was found to contain an instrument of writing, written on one page of
6 a double sheet of letter-paper, beginning with the following words, "New Orleans, April 24th, 1867, I, Norman Story, of this city," &c., and ending with the following, "proceed to sign, at this city of New Orleans, this the 24th day of April, 1867, (Signed) Norman Story," and purporting to be his olographic last will and testament, which being by me exhibited to the aforesaid witnesses, was by them recognized and declared to be entirely written, dated and signed by the testator, the said Norman Story, which they attest as having often seen him write and sign during his lifetime, and the said appearers did hereunto set their hands, after due reading hereof, on the day, month, and year first above written.

(Signed) OCTAVE HOPKINS.
Do. B. S. STORY.

Sworn to and subscribed before me this third day of March, 1875.
(Signed) A. L. TISSOT, *Judge.*

Whereupon I, the said judge, do hereby declare the said olo-
7 graphic last will and testament to be truly proved; and, having read the said will in a loud and distinct voice to the aforesaid witnesses, and in the presence of Messrs. Valentine Schehr, Joe Garidel, & als., all present in court, and after having signed the said will, ne varietur, at the begi'ning and end thereof, do now order the same to be deposited and recorded in the office of the clerk of the second district court for the parish of Orleans, and that the execution thereof take place according to law.

Done in the second district court for the parish of Orleans this third day of March, 1875.

(Signed) A. L. TISSOT, *Judge.*

(Signed) V. SCHEHR.
Do. JOE GARIDEL.

Oath of testamentary executor.—Filed March 6th, 1875.

SUCCESSION OF NORMAN STORY. } No. 37828.

State of Louisiana, second district court fore the parish of Orleans.

Before me, Jules Vienne, deputy clerk of the second district
8 court for the parish of Orleans, personally came and appeared Benjamin S. Story, who solemnly swears that he will well and faithfully perform all and singular the duties of testamentary executor of the last will and testament of Norman Story, so help him God.

(Signed) B. S. STORY.

Sworn to and subscribed before me.
New Orleans, March 6th, 1875.

(Signed) JULES VIENNE,
Deputy Clerk.

Letters testamentary.—Filed March 16th, 1875.

SUCCESSION OF NORMAN STORY. } No. 37828.

The State of Louisiana to all whom these presents may come, greeting:

Whereas Benjamin S. Story, named and appointed testamentary executor of the last will and testament of Norman Story, deceased, has applied to the second district court for the parish of Orleans by petition, praying said court to grant letters testamentary therein:

9 Now, know ye that the said Benjamin S. Story is hereby authorized and empowered to collect all the goods and effects which were of said Norman Story, deceased, and to make a just inventory thereof, and all other lawful acts to do and perform as testamentary executor of the said last will and testament.

Witness our hands and the seal of said court, at the city of New Orleans, this sixteenth day of March, in the year of our Lord one thousand eight hundred and seventy-five, and the ninety-ninth of the Independence of the United States of America.

(Signed) A. L. TISSOT, *Judge.*
(Signed) FRANK PACE, JR., *Clerk.*

Petition for inventory.—Filed March 16th, 1875.

SUCCESSION OF NORMAN STORY. } No. 37828.

To the honorable the judge of the second district court for the parish of Orleans:

The petition of Mrs. Elizabeth Story Mackie, & the wife of Dr. J. Monroe Mackie, a resident and citizen of the State of Pennsylvania, and by him duly authorized and assisted, and the petition of the said Dr. J. Monroe Mackie, to aid and authorize his wife, shows that more than ten days have elapsed since Benj. S. Story qualified as executor of the pretended last will and testament of Norman Story, deceased, and he has made no application to this court for an order to make an inventory; that your petitioner is a sister and heir of Norman Story, and entitled to a portion of his estate, and it is necessary that an inventory should be made for the protection of the rights of all parties in interest.

The premises considered, your petitioner prays that it will please your honor to order a notary public for the parish of Orleans to make an inventory of all the property of the succession, and appoint experts to appraise the same.

And your petitioner prays for general relief.

(Signed) GEO. L. BRIGHT, *Atty.*

Order.

Let the inventory within prayed for be taken by Octave Morel, notary public, in presence of all parties interested, and let Gust. Gast and Wm. E. McDermott be appointed and sworn as appraisers to value the property to be inventoried.

New Orleans, March 17th, 1875.

(Signed) A. L. TISSOT, *Judge.*

Oath of appraisers.

SUCCESSION OF NORMAN STORY. } No. 37828.

State of Louisiana, second district court for the parish of Orleans.

Before me, Joe Garidel, deputy clerk of the second district court for the parish of Orleans, personally came and appeared Gust. Gast and Wm. E. McDermott, who solemnly swear that they will well and faithfully perform all and singular the duties of appraisers, to value the property to be inventoried herein, so help them God.

(Signed) WM. E. McDERMOTT.

Do. G. GAST.

Sworn to and subscribed before me.

(Signed) JOE GARIDEL,
Deputy Clerk.

Petition for inventory.—Filed March 17th, 1875.

SUCCESSION OF NORMAN STORY. } No. 37828.

To the honorable the judge of the second district court for the parish of Orleans.

The petition of Benjamin S. Story, executor of Norman Story, respect-

fully shows that he desires an inventory taken of the effects of the succession of said deceased. Wherefore he prays that an inventory of the effects of said succession be ordered to be made by James Fahey,
13 notary, that appraisers be appointed, and for general relief.

(Signed) HAMPDEN STORY,
Do. FINNEY & MILLER, *Attys.*

Order.

Let the inventory within prayed for be taken by Jas. Fahey, notary public, in presence of all parties interested, and let Octave Hopkins and Gust. Gast be appointed and sworn as appraisers, to value the property to be inventoried.

New Orleans, March 17th, 1875.

(Signed) A. L. TISSOT, *Judge.*

Oath of appraisers.—Filed March 17th, 1875.

The State of Louisiana, second district court for the parish of Orleans.

Before me, Joe Garidel, deputy clerk of the second district court for the parish of Orleans, personally came and appeared Gust. Gast and Octave Hopkins, who solemnly swear that they will well and faith-
14 fully perform all and singular the duties of appraisers to value the property to be inventoried herein, so help them God.

(Signed) G. GAST.
Do. OCTAVE HOPKINS.

Sworn to and subscribed before me.
New Orleans, March 17th, 1875.

(Signed) JOE GARIDEL,
Deputy Clerk.

Petition for inventory.—Filed March 18th, 1875.

SUCCESSION OF NORMAN STORY. } No. 37828.

To the honorable the judge of the second district court for the parish of Orleans:

The petition of Benjamin S. Story, executor of the late Norman Story, respectfully shows, that there are two orders for inventory in this case, one upon the application of this petitioner, and one made upon the petition of Mistress Mackie, wife of J. M. Mackie, and it is desirable that the order should designate the same persons.

15 Wh*ether* petitioner prays that a new order be made in lieu of those already made; that Octave Morel be appointed as notary, and that appraisers be appointed to make inventory of the effects of said deceased, and for general relief.

(Signed) FINNEY AND MILLER.
H. STORY, *for Petr.*

Order.

Let the inventory within prayed for be taken by Octave Morel, notary public, in presence of all parties interested or them duly called, and let

Gustave Gast and Wm. E. McDermott be appointed and sworn as appraisers to value the property to be inventoried; and let all orders previously granted for the purpose of taking inventories be cancelled, annulled, and revoked.

New Orleans, March 19th, 1875.

(Signed) A. L. TISSOT, *Judge.*

Oath of appraisers.—Filed March 19th, 1875.

SUCCESSION OF NORMAN STORY. } No. 37828.

16 State of Louisiana, second district court for the parish of Orleans.

Before me, Joe Garidel, deputy clerk of the second district court for the parish of Orleans, personally came an' appeared Gustave Gast and Wm. E. McDermott, who solemnly swears that they will well and faithfully perform all and singular the duties of appraisers to value the property to be inventoried herein: So help them God.

(Signed) G. GAST.

(Do.) WM. E. McDERMOTT.

Sworn to and subscribed before me.

New Orleans, March 19th, 1875.

(Signed) JOE GARIDEL,
Deputy Clerk

Petition for homologation of inventory.—Filed April 7th, 1875.

SUCCESSION OF NORMAN STORY. } No. 37828.

To the honorable the judge of the second district court for the parish of Orleans:

17 The petition of Benjamin S. Story, testamentary executor of Newman Story deceased, respectfully shows:

That, pursuant to an order of this court, of date March 19th, 1875, an inventory of the property belonging to the succession of Norman Story, situated in the parish of Orleans, has been made by Octave Morel, notary public, and is hereto annexed as part hereof.

Wherefore petitioner prays that said inventory be duly approved and homologated, and for general relief.

(Signed) FINNEY & MILLER,
Attys. for Petr.

Order.

Let the inventory herein taken, and which is hereto annexed and filed, be approved and homologated.

New Orleans, April 8th, 1875.

(Signed) A. L. TISSOT, *Judge.*

Inventory.—Filed April 7th, 1875.

SUCCESSION OF NORMAN STORY. } No. 37828.

STATE OF LOUISIANA,
City of New Orleans:

18 Be it known that, on this twenty-third day of March, eighteen hundred and seventy-five, by virtue of and pursuant to an order

of the Hon. A. L. Tissot, judge of the second district court for the parish of Orleans, bearing date the nineteenth day of March instant, directing that an inventory of the property, moveable and immoveable, rights, credits, effects, deeds, and papers in this parish belonging or appertaining, in whole or in part, to the succession of Norman Story, late of this city, taken by the undersigned notary, which said order was rendered on the petition of Benjamin S. Story, testamentary executor of said deceased, duly certified copies of which said petition and order of court are hereto annexed for reference, and made part of this act.

I, Octave Morel, a notary public, duly commissioned and sworn, in and for this city and parish, did repair to the office of Octave Hopkins, No. 28 Union st., agent of said Norman Story, where I found assembled the following-named parties, who had been duly notified to attend, to wit:

19 1st. Benjamin S. Story, of this city, the testamentary executor and legatee of said Norman Story, deceased.

2d. Hampden Story, nephew of said deceased.

3rd. Gustave Gast and William E. McDermott, appraisers, appointed and sworn to value the property to be inventoried.

4th. Frank S. Boushab and Adolphe Nikoll, competent witnesses expressly required.

Clement Story, J. A. Fernandez, tutor of the minor children of H. Clement Story, and Mrs. Elizabeth Story Mackie not appearing, although notified to attend.

Whereupon I, notary, proceeded with the taking of a faithful and correct inventory of the property of said deceased, as the same was pointed out to me for that purpose by said agent and testamentary executor, which said property, together with the valuation thereupon affixed by the said appraisers, is set forth as follows, to wit:

STOCK.

20 Ten shares, of twenty-five dollars each, in the capital stock of the Mechanics' and Agricultural Association of Louisiana, valued at four $\frac{50}{100}$ dollars a share, to wit $45 00

One bond, Boston Club, for five hundred dollars, as per certificate No. 32, valued at five dollars 5 00

HORSES.

One black mare, twenty-one years old, valued at one hundred dollars $100 00

One colt, Saxon, valued at five hundred dollars 500 00

One colt, Norman, valued at one hundred dollars 100 00

Total $700 00

Of which one-half belongs to the succession, the other half of said horses belonging to Octave Hopkins; and the share of said deceased, being one-half, is valued at three hundred and fifty dollars, to wit $350 00

PAPERS.

21 In bank-box, titles of property, old papers, insurance-policies, leases, old bank-book of Pike, Lapeyre & Bro., bills and drafts paid by Octave Hopkins for account of Norman Story. And there being no other property on premises to be included in this inventory, I, notary, postponed the further taking of this inventory to the next day.

Total of this valuation $40 00

Thus done and closed at the place above mentioned, and the day, month, and year first above written, in the presence of the parties above named, who signed after reading.

(Signed) B. S. STORY.
HAMPDEN STORY.
G. GAST.
WM. E. McDERMOTT.
FRANK S. BOUSHAB.
A. NIKOL.
[SEAL.] OCTAVE MOREL, *Not. Pub.*

Be it known that on this twenty-fourth day of March, eighteen hundred and seventy-five, pursuant to the adjournment, I, notary, accompanied by the said appraisers, proceeded with the further taking of this inventory as follows, to wit:

REAL ESTATE.

22 1st. A lot of ground, with all the buildings and improvements thereon, situated in the first district of this city, in the square bounded by New Levee, Gravier, Common, and Tchoupitoulas streets, and designated by the number six, measuring twenty-four feet 1 inch front on New Levee street, (now Peters street,) twenty-one feet six inches and four lines in width in the rear, fronting on a common alley; sixty-one feet three inches and five lines in depth on the side adjoining lot No. 5, and fifty-three feet seven inches and four lines in depth on the other side, valued by the said appraisers at the sum of ten thousand dollars..... $10,000 00

2d. A lot of ground, with all the buildings and improvements thereon, situated in the first district of this city, in the square bounded by New Levee, Gravier, Common, and Tchoupitoulas streets, and designated by the No. five, said lot measuring twenty three feet nine inches front on New Levee st., (now Peters st.;) twenty feet eleven inches in width at the rear, fronting on a common alley; sixty-eight feet eleven inches and six lines in depth
23 on the side adjoining lot No. four, and sixty-one feet three inches and five lines in depth on the side adjoining lot No. 6, American measure, valued at ten thousand dollars..... $10,000 00

3rd. A lot of ground, with all the buildings and improvements on said lot, which is situated in the first district of this city in the square bounded by New Levee, Gravier, Common, and Tchoupitoulas streets, and designated by the No. one, and having, in American measure, twenty-six feet six inches and four lines front on Gravier street, sixty-three feet nine inches in depth and front on Tchoupitoulas street, sixty-three feet six inches and seven lines in depth on the side adjoining lot No. two, and twenty-six feet two inches in width in the rear, valued at eleven thousand five hundred dollars..... $11,500 00

4th. Another lot of ground, with all the buildings and improvements thereon, adjoining the above property, and designated by the No. 4, measuring nineteen feet
24 eleven inches front on Gravier street, eighteen feet ten inches and four lines in width in the rear, sixty-

three feet six inches and seven lines in depth on the side adjoining lot No. one, and sixty-three feet five inches and six lines in depth on the side adjoining lot No. three, valued at nine thousand dollars $9,000 00

5th. A lot of ground, with all the buildings and improvements thereon, situated in the first district of this city, in the square bounded by Common, Camp, Gravier, and Magazine streets, measuring thirty-one feet eleven inches front on Magazine street by ninety-five feet six inches in depth, between parallel lines. Said lot is formed by two lots, Nos. twelve and thirteen, which had the following dimensions, to wit: Lot No. twelve, measuring thirty-seven feet four inches and four lines front on Common street by thirty-one feet six inches and four lines in depth, and lot
25 No. thirteen measured fifty-eight feet two inches front on Common street, thirty-one feet eleven inches and five lines front on Magazine street, thirty-one feet six inches and four lines in depth on the side adjoining lot No. twelve, and sixty-three feet ten inches and four lines on the other side; which lot of ground described as above, with the buildings and improvements as they now stand, are valued at thirty-five thousand dollars $35,000 00

Total of this valuation $75,500 00

And I, notary, have adjourned the further taking of this inventory to the next day.

And the parties have signed.

(Signed) B. S. STORY.
HAMPDEN STORY.
G. GAST.
WILLIAM McDERMOTT.
FRANK S. BOUSHAB.
A. NICKOLL.
[SEAL.] OCTAVE MOREL, *Not. Pub.*

Be it known that on this twenty-fifth day of March, eighteen hundred and seventy-five, pursuant to adjournment, the further taking of this inventory was resumed.

REAL ESTATE.

1st. A lot of ground, with all the buildings and im-
26 provements thereon, and the rights, ways, servitudes, and privileges thereto belonging, situate in the first district of this city, in the square bounded by Common, Camp, Gravier, and Magazine streets. Said lot is designated by the No. eleven, and plan by G. F. Dunbar, deposited in the office of H. B. Cenas, late notary public, and measuring twenty-one feet three inches and four lines on Common street, twenty-one feet five inches in width in the rear, and ninety-six feet two inches and four lines in depth, American measure. Said property is valued at eighteen thousand dollars $18,000 00

2d. A lot of ground, with all the buildings and improvements thereon, situated in the first district of this city, in the square bounded by Common, Camp, Canal, and St.

Charles streets, and designated as lot No. two on the plan of said square, said lot having, in American measure, twenty-one feet eleven inches and two lines front on Common street, twenty feet nine inches and four
27 lines in width in the rear, seventy-eight feet eight inches and four lines in depth on the side adjoining lot No. one, and seventy-nine feet one inch on the other side, where it is bounded by a common alley, valued at seventeen thousand dollars $17,000 00

3rd. The one undivided half of a lot of ground, with all the buildings and improvements thereon, situated in the first district of this city, in the square bounded by Common, Camp, Canal, and St. Charles streets, and measuring thirty-five feet, more or less, front on Canal street by one hundred and twenty-eight feet, more or less, in depth, bounded on the side towards Camp street by property of J. Brandegel, together with an irregular-shape piece of ground in the rear, and adjacent thereto, communicating with Common street through a common alley, as shown on the plan of said square, valued at, the one undivided half, thirty-four thousand dollars $34,000 00

28 Total of this vacation $69,000 00

And the said executor having declared that he knows of no other property to be included in this inventory, I, notary public, have closed the same.

Recapitulation.

Stock, valued at fifty dollars	$	50 00
Horses, at three hundred and fifty dollars	"	350 00
Papers—Memorandum: Real estate, valued at one hundred and forty-four thousand five hundred dollars	"	144,500 00
Total of this inventory, one hundred and forty-four thousand nine hundred dollars	"	144,900 00

Thus done and closed on the day last above mentioned, and the parties having signed after reading.

(Signed) B. S. STORY.
HAMPDEN STORY.
G. GAST.
WM. E. McDERMOTT.
FRANK S. BONSHAB.
A. NIKOLL.

[SEAL.] OCTAVE MOREL, *Not. Pub.*

29 *Petition of Benj. S. Story to be recognized as sole testamentary heir of Norman Story.—Filed April 23rd*, 1875.

SUCCESSION OF NORMAN STORY. } No. 37828.

To the honorable the judge of the second district court for the parish of Orleans.

The petition of Benjamin S. Story, testamentary heir of the late Norman Story, and who resides in New Orleans, respectfully shows:

That his brother, the late Norman Story, departed this life on the , 187 ; that his succession has been opened in this court and his last will duly proved and ordered to be executed.

That by the said will of the deceased, he bequeathed all of his property of which he died possessed to this petitioner and Henry C. Story, to be divided equally between them, all of which more fully appears by said will and the probate thereof, copies whereof are herewith filed as part hereof.

30 Petitioner further shows that the said Henry Clement Story died on the 8th February, 1868, before the said Norman Story, in consequence of which petitioner in his capacity of testamentary heir of said Norman Story is entitled to all of the property, real and personal, of which said Norman Story died possessed, and petitioner is entitled to be put in possession thereof.

Petitioner shows that in his said capacity of testamentary heir of Norman Story he hereby accepts the succession of said Norman Story, simply and unconditionally, and desires to be put in possession of all the property left by said deceased.

That the said Norman Story died unmarried; left no ascendants or descendants, except a sister, Mary Elizabeth Story, now the wife of James Monro Mackie, and the children of the late Henry Clement Story, to wit, Hampden Story, Clement Story, and the following minors: Augustus Story, Saxon Story, Anna Eliza Story, Lesseps Story, Sidney Story, and Grace Story, represented by their tutor, J. A. Fernandez, all of which appears by the affidavit hereto annexed as part hereof.

31 Wherefore petitioner prays that the said Mistress Mary Elizabeth Story and her husband, J. M. Mackie, the said Hampden Story, Clement Story, and the said J. A. Fernandez, tutor of said minors, be duly cited to answer this petition, and after due proceedings, that judgment be rendered in petitioner's favor; that he be recognized and decreed to be the sole testamentary heir of said Norman Story, accepting simply and unconditionally the succession of said Norman Story, and as such that petitioner be decreed to be put in possession of all the property, real and personal, of said deceased, and for general relief.

(Signed) FINNEY AND MILLER,
Attys.

Affidavit of O. Hopkins.—Filed April 23rd, 1875.

SUCCESSION OF NORMAN STORY. } No. 37828.

I was well acquainted with the late Henry Clement Story. It is to my presonal knowledge that he departed this life on the 8th Feb-
32 ruary, 1868, previous to the death of the late Norman Story. I was well acquainted with the late Norman Story; he died unmarried, leaving no ascendants or descendants, nor brothers or sisters, except Benjamin S. Story, his brother, and Mary Elizabeth Story, his sister, now the wife of James Monro Mackie, and the following children of the said Henry Clement Story, to wit: Hampden Story, Clement Story, Augusta Story, Lesseps Story, Sidney Story, and Grace Story.

(Signed) O. HOPKINS.

Sworn to and subscribed before me this 21st day of April, 1875.

(Signed) WM. H. HOLMES,
Second Justice of the Peace, Parish of Orleans, La.

Citation to Mrs. Mary Elizabeth Story and her husband, J. M. Mackie.—Issued May 4th, 1875.

STATE OF LOUISIANA:

Second district court for the parish of Orleans.

Mrs. Mary Elizabeth Story and her husband, J. M. Mackie:

33 You are hereby summoned to comply with the demand contained in the petition, of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the second district court for the parish of Orleans in ten days after the service hereof.

Witness the honorable A. L. Tissot, judge of the said court, the twenty-sixth day of April, in the year of our Lord 1875.

(Signed) LOUIS A. RICHARDS, *Dy. Clk.*

Sheriff's return to citation.

Received April 26th, 1875; and on the 4th day of May, same year, served a copy of the within citation and accompanying petition on Mary Elizabeth Story and her husband, J. M. Mackie, defendants herein, by personal service on J. M. Mackie one of the defendants herein.

Ret. same day.

(Signed) FRANK PFISTER, *Dy. Sheriff.*

34 *Citation to Hampden Story.—Issued April 26th, 1875.*

SUCCESSION OF NORMAN STORY. } No. 37828.

STATE OF LOUISIANA:

Second district court for the parish of Orleans.

Mr. Hampden Story, of New Orleans:

You are hereby summoned to comply with the demand contained in the petition, of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the second district court for the parish of Orleans in ten days after the service hereof.

Witness the honorable A. L. Tissot, judge of the said court, the 26th day of April, in the year of our Lord 1875.

(Signed) LOUIS A. RICHARDS, *Dy. Clk.*

Sheriff's return.

35 Received April 26th, 1875; and on the 3rd day of same month and year served copy of the within citation and accompanying petition on Hampden Story, defendant herein, by leaving the same at his domiciled firm and place of business, No 9. Carondelet street, in the hands of Frederick D. King, doing business in the same office, the said defendant being absent at the time of service; all of which facts I learned by interrogating said Fred. D. King.

Retd. same day.

(Signed) F. DUPUY, *Dy. Sheriff.*

Citation to Clement Story.—Issued April 26th, 1875.

SUCCESSION OF NORMAN STORY. } No. 37828.

STATE OF LOUISIANA:

Second district court for the parish of Orleans.

Mr. Clement Story, of New Orleans:

You are hereby summoned to comply with the demand con-
36 tained in the petition, of which a copy accompanies this citation, or deliver your answer to the same, in the office of the clerk of the second district court for the parish of Orleans in ten days after the service hereof.

Witness the honorable A. L. Tissot, judge of the said court, the 26th day of April, in the year of our Lord 1875.

(Signed) LOUIS A. RICHARDS, *Dy. Clerk.*

Sheriff's return.

Received April 26th, 1875; and on the 30th day of the same month and year served copy of the *written* citation and accompanying petition on Clement Story, defendant herein, by leaving the same at the domiciled firm and place of business of Hampden Story, No. 9 Carondelet street, in the hands of Frederick D. King, doing business in the same office, said Hampden Story being absent at the time of service; all of which facts I learned by interrogating said F. D. King.

Retd. May 10th, 1875.

(Signed) F. DUPUY, *Dy. Sheriff.*

37 *Citation to J. A. Fernandez, tutor.—Issued April 26th, 1875.*

SUCCESSION OF NORMAN STORY. } No. 37828.

STATE OF LOUISIANA:

Second district court for the parish of Orleans.

J. A. Fernandez, esq., tutor:

You are hereby summoned to comply with the demand contained in the petition, of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the second district court for the parish of Orleans in ten days after the service hereof.

Witness the honorable A. L. Tissot, judge of the said court, the 26th day of April, in the year of our Lord 1875.

(Signed) LOUIS A. RICHARDS, *Dy. Clk.*

Sheriff's return.

Received April 26th, 1875; and on the 30th day of same month
38 and year I served a copy of within citation and accompanying petition on J. A. Fernandez, tutor, in person.

Returned same day.

(Signed) EUGENE MESTIER, *Dy. Sheriff.*

Answer and demand in reconvention of J. A. Fernandez, tutor, &c.—Filed May 8th, 1875.

SUCCESSION OF NORMAN STORY. } No. 37828.

Second district court for the parish of Orleans.

Joseph Anthony Fernandez, tutor of the minors Augusta Story, Saxon Story, Anna Eliza Story, Lesseps Story, Sidney Story, and Grace Story, now comes into court, by his attorneys, and for answer to the plaintiff's petition says that he denies all and singular the facts and allegations therein contained, so far as the same may have a tendency to give said plaintiff any right or cause of action against respondent. And for further answer respondent says that if the will relied upon by the plaintiff has any validity whatever, which is denied, the intention of the
39 testator clearly expressed in said instrument, or in a manner not to be misunderstood, was that the plaintiffs should never have more than one-half of his estate, which, in the language of the testator, was to be equally divided between the plaintiff and his brother, H. C. Story; that the death of the said Henry C. Story prior to the decease of the testator has made the testator's estate a legitimate succession at least so far as one-half thereof is concerned, and that your respondent's wards aforesaid are entitled together to the succession of the decedent as his legitimate heirs to the extent of one-fourth thereof.

Wherefore respondent respectfully prays that the plaintiff's petition be dismissed with costs, and that a judgment in reconvention be rendered in favor of your respondent, in his fiduciary capacity aforesaid, recognizing his wards aforesaid as legitimate heirs of the deceased for one-fourth part of his estate, *as* such other portion thereof as this honorable
40 court may, after hearing the parties, decree your respondent's wards to be entitled to, and that respondent may be put in said representative capacity in possession of said portion of the testator's estate; and your respondent prays for general relief, & as in duty bound, &c.

(Signed) SAMBOLA & DUCROS, *Attys.*

Petition for removal to U. S. circuit court.—Filed May 12th, 1875.

SUCCESSION OF NORMAN STORY. } No. 37828.

To the honorable the judge of the second district court for the parish of Orleans:

The petition of Mary Elizabeth Story, now the wife of Dr. J. Monroe Mackie, and the petition of her husband, J. Monro Mackie, respectfully shows that a petition has been filed in this court by Benjamin S. Story against your petitioners and Hampden Story, Clement Story, and the following minors: Augusta Story, Saxon Story, and Grace Story, represented by their tutor, J. A. Fernandez, wherein the said Benja-
41 min S. Story prays for judgment in his favor, that he be recognized and decreed to be the sole testamentary heir of said Norman Story, deceased, and as such be decreed to be put possession of all the property, real and personal, of said deceased.

Now your petitioner shows that the aforesaid property, constituting the succession or estate of Norman Story, as well as the share of your

petitioner therein, largely exceeds the value of five thousand dollars; that your petitioners are residents and citizens of the State of Pennsylvania, and all the other parties to the suit are residents and citizens of the State of Louisiana.

Your respondents make and file the bond required by the statute of the United States approved March 3rd, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of cause from State courts, and for other purposes."

The premises considered, your petitioners pray this hon. court to
42 accept this petition and bond and remove this suit and these proceedings to the circuit court of the United States for the fifth circuit and district of Louisiana, to be there entered on the first day of its then next session, and that the clerk of this court be ordered to make for your petitioner a copy of the record to be filed in the said circuit court.

And your petitioners pray for general relief.

(Signed) GEO. L. BRIGHT,
Atty. for Petrs.

J. Monroe Mackie sworn, says he is one of the petitioners, and all and singular the allegations in the foregoing petition are true.

(Signed) J. MONROE MACKIE.

Sworn to and subscribed before me.
New Orleans, May 4th, 1875.

(Signed) JOE GARIDEL,
Dy. Clerk.

Bond for removal of suit.—Filed May 12th, 1875.

SUCCESSION OF NORMAN STORY. } No. 37828.

Second district court.

THE STATE OF LOUISIANA,
City of New Orleans:

43 Know all men by these presents that we, Mary Elizabeth Story Mackie, and her husband, Dr. J. Monroe Mackie, both residents of Philadelphia, and citizens of the State of Pennsylvania, as principals, and L. J. Harris, of the city of New Orleans, as security, are held and firmly bound unto Benjamin S. Story, Hampden Story, Clement Story, and J. A. Fernandez, tutor of the minors Augusta Story, Saxon Story, and Grace Story, jointly and separately.

Whereas the said Mary Elizabeth Story Mackie, and her husband, J. Monroe Mackie, have this day presented a petition to the hon. the second district court for the parish of Orleans for the removal to the circuit court of the United States for the fifth circuit and district of Louisiana of the suit or proceedings instituted against them by Benjamin S. Story:

Now, the condition of this bond is that we, the above-bounden as principals and surety, bind ourselves to enter into such circuit court on the
44 first day of its next session a copy of the record in such suit, and will pay all costs that may be awarded by said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto.

New Orleans, May 11th, 1875.

(Signed) J. MONROE MACKIE.
(do.) L. J. HARRIS.

Order to remove suit.—Filed May 15th, 1875.

SUCCESSION OF NORMAN STORY. } No. 37828.

Considering the petition herein filed and the bond furnished by the petitioner:

It is ordered that the said petition be aceepted, and that this suit and these proceedings be removed to the circuit court of the United States for the fifth circuit and district of Louisiana, to be there entered on the first day of its next session, and that the clerk of this court be ordered to furnish a copy of said proceedings to be filed in said U. S. circuit court as within prayed for and according to law.

New Orleans, May 15th, 1875.

(Signed) A. L. TISSOT, *Judge.*

45 *Clerk's certificate.*

State of Louisiana, second district court for the parish of Orleans.

I, Frank Pace, jr., clerk of the second district court for the parish of Orleans, and as such duly commissioned and sworn, do hereby certify that the foregoing (48) forty-eight pages contain a true and correct transcript of all the proceedings had, of all the documents filed and of record in the matter of the succession of Norman Story, No. 37828 of the docket of this court, "Removal of suit to the circuit court of the United States for the fifth circuit and district of Louisiana."

In testimony whereof I have hereunto set my hand and affixed the seal of our said court at the city of New Orleans on this twenty-fifth day of May, in the year of our Lord one thousand eight hundred and seventy-five, and the 99th year of the Independence of the United States of America.

(Signed) FRANK PACE, JR., *Clerk.*

46 PROCEEDINGS IN THE CIRCUIT COURT OF THE UNITED STATES, FIFTH CIRCUIT AND DISTRICT OF LOUISIANA.

Answer of Mrs. Mackie.—Filed June 2d, 1875.

BENJAMIN S. STORY
vs.
MRS. ELIZABETH STORY MACKIE AND OTHERS.

Before the United States circuit court for the fifth circuit and district of Louisiana.

The answer of Mary Elizabeth Story Mackie, aided and assisted by her husband J. Monroe Mackie:

This defendant, Mrs. Mary Elizabeth Story Mackie, aided and assisted by her said husband, for answer to the petition or bill of Benjamin S. Story, says, she admits that Norman Story died on the 28th day of January, 1875; that he died leaving an olographic will in the words and figures following:

"NEW ORLEANS, *April 24th*, 1867.

"I, Norman Story, of this city of New Orleans, of sound body and of sound mind, but having the uncertainty of life in view, do write

47 this my last olographic will and testament, hereby expressly revoking all other wills and testaments by me written heretofore.

"1st. I appoint my brother, Benjamin S. Story, to act as executor of this my last will (without security.)

"2d. It is my wish that all my just debts shall be paid without delay.

"3rd. I will and bequeath to Henry C. Story and Benj. S. Story all properties I die possessed of, to be divided equally between them

"This my last olographic will and testament I have entirely written, and now proceed to sign, at this city of New Orleans, this the 24th day of April, 1867.

(Signed) "NORMAN STORY."

She admits that Henry Clement Story, the legatee mentioned in the will, died on the 8th of February, 1868, before the testator, Norman Story, but she denies by reason of the death of Henry Clement Story the plaintiff, Benjamin S. Story, is entitled to all the property, real and personal, of which said Norman Story died possessed; and she denies that the plaintiff is entitled to be put in possession thereof.

48 She admits that Norman Story died unmarried, leaving no ascendants or descendants, nor collateral relations, except the plaintiff, Benjamin S. Story, his brother; this respondent, Mary Elizabeth Story Mackie, his sister, and the children of his deceased brother, Henry Clement Story, his nephew and nieces.

Now your respondent shews that the said Norman Story did not by his will give more than one-half of his estate to Benj. S. Story, and it never was his will or intention that the said Benjamin S. Story should ever under any circumstances, and especially in case of the death of Henry Clement Story before that of the testator, take more than one half of the estate; and it was not the intention of the testator that the said Benjamin S. Story should take the share which the children of Henry Clement Story and your respondent are in law legally entitled to in case Henry Clement Story should die before the testator.

49 Your respondent shews that by the death of Henry Clement Story before that of Norman Story, the testator, the legacy to him became null and void, but the share of Benjamin S. Story was not enlarged. The death of Henry Clement Story produced an intestacy for one-half of the estate, and in law this one-half should be equally divided between your respondent and the children of Henry Clement Story, and Benjamin S. Story should not take it all.

And your respondent shows that her share in the estate of Norman Story, deceased, largely exceeds the sum of six thousand dollars.

The premises considered, your respondent prays that there be judgment against the prayer of Benjamin S. Story, and in her favor, decreeing her to be the lawful heir of Norman Story, deceased, and entitled to one-fourth of his estate, and that she be put in immediate possession thereof.

And your respondent prays for costs and for general relief.

(Signed) GEO. L. BRIGHT,
Counsel for Respondent.

50 *Answer of Hampden Story and Clement Story.—Filed June 16th, 1875.*

U. S. circuit court.

BENJAMIN S. STORY
vs.
MARY ELIZABETH STORY MACKIE ET ALS. } No. 7430.

Now comes Hampden Story and Clement Story, and for answer to the petition of Benjamin S. Story, praying to be recognized as the sole testamentary heir of Norman Story, deceased, these defendants admit the will of said Norman Story, and the probate thereof, the death of Henry Clement Story before the death of said Norman Story, as set forth in plaintiff's petition.

These defendants admit that the said Norman Story left surviving at his death his brother, the said Benjamin S. Story; his sister, Mrs. Mary Elizabeth Mackie; and the childrenof said Henry C. Story, deceased, the brother of said Norman Story; said children being these respondents, and the minors named in said petition These respond-
51 ents deny that by the effect of said will and the death of Henry Clement Story said Benjamin S. Story became entitled to all of the estate of said Norman Story; but, on the contrary, these respondents insist that one-half only of the estate of said Norman Story accrues to and is inherited by said Benjamin S. Story under said will, and the other half of said estate accrues to and is inherited by the children of said Henry C. Story, including these respondents, inheriting in the right of their father, the said Henry C. Story, and by the said Mistress Mary Elizabeth Story, wife of said J. Monroe Mackie.

Wherefore respondents pray for judgment in their favor, recognizing their rights as heirs of said Norman Story, deceased, and for general relief.

(Signed) FRED. D. KING,
Attorney for Respondents.

52 *Hearing and submission of cause.—Extract from the minutes.—April term*, 1876.

NEW ORLEANS, *Tuesday, May 9th*, 1876.

Court met pursuant to adjournment. Present, Hon. Edward C. Billings, dist. judge.

BENJ. S. STORY
vs.
MARY E. STORY MACKIE ET AL. } No. 7430.

This cause was called for trial—Finney & Miller, for plaintiff, Geo. L. Bright, for defendants—and after hearing the pleadings, evidence, and argument, the court took time to advise.

Judgment.—Extract from judgment-docket.—April term, 1876.

NEW ORLEANS, *Monday, June 5th*, 1876.

Court met pursuant to adjournment. Present, Hon. Edward C. Billings, district judge.

BENJAMIN S. STORY
vs.
MARY ELIZABETH STORY MACKIE ET AL. } No. 7430.

53 This day came the parties, by their attorneys, and having in open court waived the trial by jury, submitted the cause on the

pleadings and proofs in the record; and the court, considering that the legacy contained in the will of the late Norman Story of all the property of which the testator died possessed to his brothers, Benjamin L. S. Story and Henry Clement Story, is a conjoint legacy, and that by the death of Henry Clement Story, one of the legatees, before the death of the testator, the other legatee, Benjamin S. Story, becomes entitled, by right of accretion, to all the property left by the testator at his death.

It is therefore ordered, adjudged, and decreed that the plaintiff, Benjamin S. Story, be recognized and decreed to be the sole heirs of Norman Story, deceased, by virtue of his last will and testament; that in his capacity of sole heir said Benjamin S. Story is hereby decreed to be put in possession of all the estate, real and personal, left by said Norman Story at his decease, and that the demand of the defendants, Mary Elizabeth Story Mackie, of Hampden Story, of Clement
54 Story, and of the minors, Augusta Story, Saxon Story, Anna Eliza Story, Lesseps Story, Sidney Story, and Grace Story, to be recognized as heirs of said Norman Story, be rejected, and that the said defendants pay the costs of this suit.

Judgment rendered June 5th, 1876.

Judgment signed June 9th, 1876.

(Signed) EDWARD C. BILLINGS, *Judge.*

Bill of exception of defendants, No. 1.—*Filed June* 9*th*, 1876.

BENJAMIN S. STORY
vs.
MARY ELIZABETH MACKIE AND THE CHILDREN of Henry Clement Story. } No. 7430.

Before the circuit court of the United States for the 5th circuit and district of Louisiana.

Be it remembered that on the trial of this cause, counsel for Mrs. Mary Elizabeth Story Mackie offered the testimony of a number of witnesses tending to prove the situation and condition of the testator, Norman Story, and of all the parties to this suit at the date of the will and at the date of the death of the testator, Norman Story, in
55 order that the court might read the will by the light of surrounding circumstances, and interpret and construe it according to the intention under which it was written.

And counsel offered to establish by said witnesses that at the date of the will there were living the testator, Norman Story, his brothers Benjamin Story and Henry Clement Story, and his sister, Mary Elizabeth Story Mackie.

That the testator, Norman Story, was never married and both his father and mother were dead.

That Benjamin was not married at the date of the will, and though now married has not had any children.

That Henry Clement Story was the oldest of all, was married at the date of the will and had then eight children, who are now living; that he died poor, leaving no property; was the favorite brother of Norman; that Norman was the youngest of the family and lived with his
56 brother, Henry Clement, and was in the habit of assisting him pecuniarily.

That Benjamin is now and was rich at the date of the will; that Mrs.

Elizabeth Story Mackie had at the date of the will several children that are now living.

That the plaintiff, Benjamin S. Story, has privately agreed with some of the children of Henry Clement Story, parties to this suit, that he would give to them the whole or a portion of the property he would or might recover by this suit, although the judgment of the court might be against them.

The counsel for the plaintiff objected to the introduction of this evidence on the ground that it was not admissible for the purposes for which it was offered.

The court maintained the objection, rejected and excluded the evidence on the ground that the will is clear and unambiguous; that parol evidence is not admissible to vary or affect it, and that the effect of the legacy contained in the will is fixed by art. 1700 of the civil code of Louisiana.

57 And to the ruling of the court, counsel for the defendant, Mrs. Elizabeth Story Mackie, excepted then and there and offered for the signature of the court this bill of exception, after submitting it to the counsel for the plaintiff and of the other defendants.

New Orleans, 9th June, 1876.

Allowed.

(Signed) EDWARD C. BILLINGS, *Judge.*

Bill of exception of defendants No. 2.—Filed June 9th, 1876.

BENJ. S. STORY
vs.
MRS. ELIZABETH STORY MACKIE & AL. } No. 2.

Before the circuit court of the United States for the 5th circuit and district of Louisiana.

Be it remembered that it being admitted by all the parties in interest, and it appearing by the records, that Norman Story died on the 28th January, 1875, leaving neither ascendants nor descendants and only his brother and sister, viz, Benjamin S. Story, Mrs. Elizabeth Story

58 Mackie, and the children of his deceased brother Henry Clement Story, eight in number, viz: Hampden Story, Clement Story, Augusta Story, Saxon Story, Anna Eliza Story, Lesseps Story, Sidney Story, Grace Story. The six latter represented by their tutor, J. A. Fernandez.

That Henry Clement Story died on the 8th February, 1868, leaving the aforesaid eight children now living.

That Norman Story died leaving an olographic will in the words and figures following:

"NEW ORLEANS, *April 24th*, 1867.

'I, Norman Story, of this city of New Orleans, of sound body and of sound mind, but having the uncertainty of life in view, do write this my last olographic will and testament, hereby expressly revoking all other wills and testaments by me written.

"1st. I appoint my brother Benjamin S. Story to act as executor of this my last will, (without security.)

"2d. It is my wish that all my just debts shall be paid without

59 delay.

"3rd. I will and bequeath to Henry C. Story and Benjamin S.

Story all properties I die possessed of, to be divided equally between them.

"This my last olographic will and testament I have entirely written, and now proceed to sign, at this city of New Orleans, on this 24th day of April, 1867.

(Signed) "NORMAN STORY."

That the share claimed by Mrs. Mary Elizabeth Story Mackie largely exceeds the sum of six thousand dollars; and it being proved that said will has been duly probated; that Benjamin S. Story had accepted unconditionally the legacy contained in the will by applying to the 2d district court of the parish to be recognized as sole heir of the deceased Norman Story, under the will, and to be put in possession of all his estate, and it being proved that said deceased left an estate consisting of real and personal property in this parish exceeding in value seventy-five thousand dollars, and the evidence herein closed on both sides.

Whereupon counsel for Mrs. Mary Elizabeth Story Mackie, one
60 of the defendants on the trial of the cause, moved the court to decide and decree that the testamentary disposition in favor of Henry Clement Story became null and void, and without effect, by reason of his death before that of the testator; that the disposition in his favor lapsed, and the share that he would have taken had he survived became intestate, and belonged to the next of kin to the testator, Norman Story.

And moved the court to decide and decree her to be one of the lawful heirs of Norman Story, deceased, and entitled to one-fourth of his estate and to put her in possession thereof.

But the court refused so to decide and decree, but on the contrary decided and decreed "that the plaintiff, Benjamin S. Story, be recognized and decreed to be the sole heir of Norman Story by virtue of his last will and testament; that in his capacity of sole heir, said Benjamin S. Story is hereby decreed to be put in possession of all the estate, real and personal, left by said Norman Story at his decease, and that the de-
61 mand of the defendants Mary Elizabeth Story Mackie, of Hampden Story, of Clement Story, and of the minors Augusta Story, Saxon Story, Lesseps Story, Sidney Story, and Grace Story to be recognized as heirs of said Norman Story be rejected, and that the said defendants pay the costs of this suit."

To the ruling, decision, and decree of the court, counsel for Mrs. Mary Elizabeth Story Mackie then and there excepted, and offers for signature of the court this bill of exception, after submitting it to counsel for the plaintiff and of the other defendants.

New Orleans, June 5th, 1876.

Allowed.

(Signed) EDWARD C. BILLINGS,
Judge.

Petition and order for writ of error.—Filed June 9th, 1876.

BENJAMIN S. STORY
vs.
MRS. ELIZABETH STORY MACKIE AND OTHERS.

To the hon. the judges of the United States circuit court for the 5th circuit and district of Louisiana:

62 The petition of Mrs. Mary Elizabeth Story Mackie and of her

husband, Dr. J. Monroe Mackie, to aid and assist her, one of the defendants herein, respectfully represents:

That a final judgment was rendered on the 5th day of June, 1876, against your petitioner, and in favor of the plaintiff, Benjamin S. Story, by which it is ordered, adjudged, and decreed that the plaintiff Benj. S. Story be recognized and decreed to be the sole heir of Norman Story, deceased, by virtue of his last will and testament; that in his capacity of sole heir, said Benjamin S. Story is hereby decreed to be put in possession of all the estate, real and personal, left by said Norman Story at his decease, and that the demand of the defendants Mary Elizabeth Story Mackie, of Hampden Story, of Clement Story, and of the minors Augusta Story, Saxon Story, Anna Eliza Story, Lesseps Story, Sidney Story, and Grace Story to be recognized as heirs of said Norman Story be rejected and that the said defendants pay the costs of suit.

63 Your petitioner shews that her claim largely exceeds the sum of six thousand dollars.

Your petitioner shews that she is aggrieved by said judgment and desirous to prosecute a writ of error from the same.

Your petitioner prays that a writ of error to operate as a supersedeas be allowed him from said judgment, returnable to the next term of the Supreme Court of the United States, on executing such bond as the court and the law may require. And for general relief.

(Signed) GEO. L. BRIGHT,
Counsel for Pet'r.

Geo. L. Bright, atty. for the petitioner, sworn, says that the petitioner is now absent from the State and out of the jurisdiction of this court, and that all and singular the allegations in the foregoing petition are true.

(Signed) GEO. L. BRIGHT.

Sworn to and subscribed before me this 9th day of June, 1876.

(Signed) F. B. VINOT,
U. S. Commissioner.

64 A writ of error to operate as a supersedeas is allowed in this case as prayed for and according to law, returnable to the Supreme Court of the United States on the second Monday of October, 1876, the petitioners giving bond in the sum of five hundred dollars, with good and solvent security, conditioned as the law directs.

June 9th, 1876.

(Signed) EDWARD C. BILLINGS,
Judge.

Bond for writ of error.—Filed June 10th, 1876.

Know all men by these presents that we, Mrs. Mary Elizabeth Story Mackie and her husband, J. M. Mackie, as principals, and Levi J. Harris, as surety, are held and firmly bound unto Benjamin S. Story and all other persons having any interest, in the full and just sum of five hundred dollars, to be paid to the said Benjamin S. Story, and all other persons having any interest, their certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 10th day of June,

65 in the year of our Lord one thousand eight hundred and seventy-six.

Whereas, lately, at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the district of Louisiana, in a suit depending in said circuit court wherein Benjamin S. Story, plaintiff, and Mary E. Story Mackie and others are defendants, judgment was rendered against the said Mary E. Story Mackie, defendant; and the said Mary Elizabeth Story Mackie having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and citation directed to the said Benjamin S. Story, Hampden Story, Clement Story, and J. A. Fernandez, tutor, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the 2d Monday of October next:

Now the condition of the above obligation is such that if the said Mr. and Mrs. Mackie shall prosecute their writ to effect
66 and answer all damages and costs if they fail to make plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) GEO. L. BRIGHT, [L. S.]
Counsel for Mr. & Mrs. Mackie.

(Signed) L. J. HARRIS. [L. S.]

The surety is approved.

(Signed) H. C. MILLER,
Atty. for Plff.

Approved.

(Signed) EDWARD C. BILLINGS,
Judge.

DISTRICT OF LOUISIANA:

Levi J. Harris, surety on the within bond, being duly sworn, says that he resides in the city of New Orleans, Louisiana; that he is worth the sum of five hundred dollars over and above his debts and liabilities and property exempt from execution.

(Signed) L. J. HARRIS.

Subscribed and sworn before me this 10th day of June, 1876.

(Signed) F. P. VINOT,
U. S. Commr.

67 *Bill of exceptions of the minors Story.—Filed June 10th, 1876.*

BENJAMIN S. STORY	}	No. Before the circuit
vs.		court of the United
MARY ELIZABETH MACKIE AND THE CHILDREN of Henry Clement Story.	}	States for the 5th circuit & dist. of La.

Be it remembered that, on the trial of this cause, counsel for J. A. Fernandez, the tutor of the minor children of Henry Clement Story, offered the testimony of a number of witnesses tending to prove the situation and condition of the testator Norman Story and of all the parties to this suit at the date of the will and at the date of the death of said testator, in order that the court might read the will by the light of surrounding circumstances, and interpret and construe it according to the intention under which it was written.

And counsel offered to establish by said witnesses that at the date of the will there were living the testator, Norman Story, his brothers Benjamin Story and Henry Clement Story, and his sister, Mary Elizabeth Story Mackie.

68 That the testator, Norman Story, was never married, and both his father and mother were dead.

That Benjamin was not married at the date of the will, and though now married, has not had any children.

That Henry Clement Story was the oldest of all; was married at the date of the will, and had then eight children who are now living; that he died poor, leaving no property; was the favorite brother of Norman; that Norman was the youngest of the family, and lived with his brother Henry Clement, and was in the habit of assisting him pecuniarily.

That Benjamin is now and was rich at the date of the will; that Mrs. Elizabeth Story Mackie had at the date of the will several children that are now living.

That the plaintiff, Benjamin S. Story, has privately agreed with some of the children of Henry Clement Story, parties to this suit, that he would give to them the whole or a portion of the property he would or might recover by this suit, although the judgment of the court might be against them.

69 The counsel for the plaintiff objected to the introduction of this evidence on the ground that it was not admissible for the purposes for which it was offered.

The court maintained the objection, rejected and excluded the evidence on the ground that the will is clear and unambiguous; that parol evidence is not admissable to vary or affect it, and that the effect of the legacy contained in the will is fixed by act 1700 of the civil code of Louisiana.

And to the ruling of the court counsel for the tutor of the children of the said Henry Clement Story excepted there and then, and offers for the signature of the court this bill of exception, after submitting it to the counsel for the plaintiff and of the other defendants.

New Orleans, May 9th, 1876.

Allowed.

(Signed) EDWARD C. BILLINGS, *Judge.*

70 *Bill of exception of the minors Story.—Filed June 10th, 1876.*

BENJ. S. STORY *vs.* MRS. ELIZABETH STORY MACKIE ET AL. } No. Circuit court of the United States for the 5th circuit & dist. of La.

Be it remembered that it being admitted by all the parties in interest, and it appearing by the record, that Norman Story died on the 28th of January, 1875, leaving neither ascendants nor descendants, and only his brother and sister, viz, Benjamin S. Story, Mrs. Elizabeth Story Mackie, and the children of his deceased brother, Henry Clement Story, eight in number—Hampden Story, Clement Story, Augusta Story, Saxon Story, Anna Eliza Story, Lesseps Story, Sidney Story, and Grace Story—the six latter represented by their tutor, J. A. Fernandez.

That Henry Clement Story died on the 8th of February, 1868, leaving the aforesaid eight children, now living.

71 That Norman Story died leaving an olographic will in the words and figures following:

"NEW ORLEANS, *April 24th*, 1867.

"I, Norman Story, of this city of New Orleans, of sound body and of sound mind, but having the uncertainty of life in view, do write this my last olographic will and testament, hereby expressly revoking all other wills and testaments by me written.

"1st. I appoint my brother Benjamin S. Story to act as executor of this my last will, (without security.)

"2d. It is my wish that all my just debts shall be paid without delay.

"3rd. I will and bequeath to Henry C. Story and Benjamin S. Story all properties I die possessed of, to be divided equally between them.

"This my last olographic will and testament I have entirely written and now proceed to sign, at this city of New Orleans, on this 24th day of April, 1867.

(Signed) "NORMAN STORY."

That the share claimed by J. A. Fernandez, tutor of the minors Story, largely exceeds the sum of six thousand dollars.

And it being proved that said will has been duly probated;
72 that Benjamin S. Story had accepted unconditionally the legacy contained in the will by applying to the second district court of this parish to be recognized as sole heir of the deceased Norman Story under the will, and to be put in possession all his estate, and it being proved that said deceased left an estate of real and personal property in this parish exceeding in value seventy-five thousand dollars.

Whereupon counsel for J. A. Fernandez, tutor of the minors Story, one of the defendants on the trial of the cause, moved the court to decide and decree that the testamentary disposition in favor of Henry Clement Story became null and void and without effect by reason of his death before that of the testator; that the disposition in his favor lapsed, and the share that he would have taken had he survived became intestate estate and belonged to the next of kin of the testator, Norman Story.

And moved the court to decide and decree the said minors to be the lawful heirs of Norman Story and entitled to one-fourth of his
73 estate, and to be put in possession thereof.

But the court refused so to decide and decree, but, on the contrary, decided and decreed that the plaintiff, Benjamin S. Story, be recognized and decreed to be the sole heir of Norman Story by virtue of his last will and testament; that in his capacity of sole heir the said Benjamin S. Story is hereby decreed to be put in possession of all the estate, real and personal, left by said Norman Story at his decease, and that the demand of the defts. Mary Elizabeth Story Mackie, of Hampden Story, of Clement Story, and of the minors Augusta Story, Saxon Story, Anna Eliza Story, Lesseps Story, and Sidney Story, and Grace Story to be recognized as heirs of Norman Story be rejected, and that the said defendants pay the costs of this suit.

To the ruling, decision, and decree of the court counsel for J. A. Fernandez, tutor of the minors Story, excepted, and offers for the signature of the court this bill of exceptions, after submitting it to counsel for plffs. and the other defendants.

New Orleans, June 5th, 1876.

Allowed.

(Signed) EDWARD C. BILLINGS, *Judge.*

74 *Petition and order for writ of error.—Filed June 10th, 1876.*

BENJAMIN S. STORY
vs.
MRS. ELIZABETH STORY MACKIE AND OTHERS. } No. 7430.

To the hon. the judges of the United States circuit court for the fifth circuit and district of Louisiana:

The petition of Joseph Anthony Fernandez, tutor of the minors Au-

gusta Story, Saxon Story, Anna Eliza Story, Lessepps Story, Sidney Story, and Grace Story, defendants herein, respectfully represents:

That a final judgment was rendered on the 5th of June, 1876, against your petitioner and in favor of the plaintiff, Benjamin S. Story, by which it was ordered, adjudged, and decreed that the plaintiff, Benj. S. Story, be recognized and decreed to be the sole heir of Norman Story, deceased, by virtue of his last will and testament; that in his capacity of sole heir said Benjamin S. Story is hereby decreed to be put in pos-
75 session of all the estate, real and personal, left by said Norman Story at his decease, and that the demand of the defendants Mary Elizabeth Story Mackie, of Hampden Story, of Clement Story, Saxon Story, and Grace Story to be recognized as heirs of Norman Story be rejected, and that the said defendants pay the costs of suit.

Your petitioner shews that the claim of said minors largely exceeds the sum of six thousand dollars.

Your petitioner shows that he is aggrieved by said judgment, and desires to prosecute a writ of error from the same.

Your petitioner prays that a writ of error to operate as a supersedeas be allowed her from said judgment, returnable to the next term of the Supreme Court of the United States, on executing such bond as the court and the law may require.

And for general relief.

(Signed) SAMBOLA & DUCROSS AND
GEO. L. BRIGHT,
Counsel for Petitioner.

J. A. Fernandez, sworn, says that all and singular the allega-
76 tions in the foregoing petition are true.

(Signed) J. A. FERNANDEZ.

Sworn to and subscribed before me this 10th day of June, 1876.

(Signed) F. B. VINOT,
U. S. Comm'r.

A writ of error to operate as a supersedeas is allowed in this case as prayed for and according to law, returnable to the Supreme Court of the United States on the second Monday of October, 1876, the petitioners giving bond in the sum of five hundred dollars, with good and solvent security, conditioned as the law directs.

New Orleans, June 10th, 1876.

(Signed) EDWARD C. BILLINGS,
Judge.

Bond for writ of error.—Filed June 10th, 1876.

Know all men by these presents that we, J. A. Fernandez, tutor of the minors Augusta Story, Saxon Story, Anna E. Story, Leseps Story, Sidney Story, and Grace Story, as principals, and Geo. L. Bright, as surety, are held and firmly bound unto Benjamin S. Story, and
77 all other persons in interest, their certain attorney, executors, administrators, jointly and severally, by these presents, sealed with our seals, and dated this 10th day of June, in the year of our Lord one thousand eight hundred and seventy-six.

Whereas lately, at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the district of Louisiana, in a suit depending in said circuit court wherein Benjamin S. Story is plaintiff,

and Mrs. Mary E. Story Mackie and others defendants, judgment was rendered against the said J. A. Fernandez, tutor, as aforesaid, defendant, and the said J. Fernandez, tutor, as aforesaid, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Benjamin S. Story, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the 2d Monday of October next:

78 Now, the condition of the above obligation is such, that if the said J. A. Fernandez, tutor, shall prosecute his writ to effect and answer all damages and costs if he fail to make plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) J. A. FERNANDEZ, *Tutor.* [L. S.]
(do.) GEO. L. BRIGHT. [L. S.]

Sealed and delivered in the presence of—
(Signed) F. B. VINOT.

Approved.
(Signed) EDWARD C. BILLINGS, *Judge.*

DISTRICT OF LOUISIANA:

George L. Bright, surety on the within bond, being duly sworn, says that he resides in the city of New Orleans, Louisiana; that he is worth the sum of five hundred dollars over and above his debts and liabilities and property exempt from execution.

(Signed) GEO. L. BRIGHT.

Subscribed and sworn before me this 10th June, 1876.
(Signed) F. B. VINOT,
U. S. Commr.

Agreement relative to writs of error.—Filed June 29th, 1876.

U. S. circuit court, dist. of Louisiana.

BENJAMIN S. STORY
vs.
MRS. ELIZABETH STORY MACKIE & OTHERS } No. 7430.

79 Hampden Story and Clement Story, two of the defendants in the above-entitled suit, have declined to join in the writs of error sued out by Mrs. Mary Elizabeth Story Mackie and J. A. Fernandez, tutor—

It is agreed that the writs of error sued out by Mrs. Mary Elizabeth Story Mackie and J. A. Fernandez, tutor, shall stand without making the said Hampden Story and Clement Story parties thereto.

(Signed) FINNEY & MILLER,
Attys. for Plff., B. S. Story.
(Signed) FRED. D. KING,
Atty. for Hampden Story and Clement Story.
(Signed) GEO L. BRIGHT,
Atty. for Mrs. Mackie and J. A. Fernandez, Tutor.

80 United States of America, circuit court of the United States, fifth circuit and district of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, do hereby certify that the foregoing 79 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had on the trial of the case of Benjamin S. Story versus Mary Elizabeth Story Mackie and others, No. 7430 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 8th day of August, A. D. 1876.

[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, William B. Woods, United States judge for the district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law; and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 8th day of August, A. D. 1876.

W. B. WOODS, *Judge.*

81 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between Benjamin S. Story, plaintiff, and Mrs. Mary Elizabeth Story Mackie, and her husband, Dr. J. Monroe Mackie, to aid and assist her, defendants, and other codefendants, a manifest error hath happened, to the great damage of the said Mrs. Mary Elizabeth Story Mackie, as by her complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States, this 9th day of June, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.] F. A. WOOLFLEY,
Clerk of the United States Circuit Court
for the District of Louisiana.

(Endorsed:) United States circuit court. No. 7430. Mrs. Mary Elizabeth Story Mackie, pl'ff in error, versus. Benj. S. Story, defendant in error. Writ of error. Filed June 9, 1876. F. B. Vinot, dy. clk.

82 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the district of Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Benjamin S. Story, plaintiff, and Joseph Anthony Fernandez, tutor of the minors Augusta Story, Saxon Story, Anna E. Story, Lesseps Story, Sidney Story, and Grace Story, defendants in the case entitled "Benjamin S. Story versus Mary Elizabeth Story Mackie et al.," a manifest error hath happened, to the great damage of the said minors, as by their complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States, this 10th day of June, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.] F. A. WOOLFLEY,
Clerk of the United States Circuit Court
for the District of Louisiana.

(Indorsed:) United States circuit court. No. 7430. Writ of error. J. A. Fernandez, tutor of the minors Story, plaintiff in error, versus Benjamin S. Story, defendant in error. Filed June 10, 1876. F. B. Vinot, dy. clk.

83 THE UNITED STATES OF AMERICA:

Circuit court of the United States, district of Louisiana.

The President of the United States to Benjamin S. Story, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein Joseph Anthony Fernandez, tutor of the minors Augusta Story, Saxon Story, Anna E. Story, Lesseps Story, Sidney Story, and Grace Story, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said minors, as in said mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 10th day of June, in the year of our Lord one thousand eight hundred and seventy-six.

EDWARD C. BILLINGS, *Judge.*

84 (Indorsed:) United States circuit court. No. 7430. J. A. Fernandez, tutor, plaintiff in error, vs. Benj. S. Story, defendant in error. Citation to Benj. S. Story.

Marshal's return.

Received Jun' 12, 1876, by the U. S. marshal, and on the 24th day of June, 1876, served a copy thereof on Benjamin S. Story, defendant in error, by handing the same to H. C. Miller, his attorney, in person, in the city of New Orleans.

S. B. PACKARD,
U. S. Marshal,
By S. W. REED,
D'y Marshal.

On this 6th day of July, 1876, personally appeared before me the subscriber, S. W. Reed, and makes oath that he served a copy of the within citation, as stated in his official return hereon.

S. W. REED,
D'y U. S. Marshal.

Subscribed and sworn to before me this 6th day of July, 1876.

F. B. VINOT,
U. S. Commr.

85 THE UNITED STATES OF AMERICA:

Circuit court of the United States, district of Louisiana.

The President of the United States to Benjamin S. Story, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein Mrs. Mary Elizabeth Story Mackie is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 10th day of June, in the year of our Lord one thousand eight hundred and seventy-six.

EDWARD C. BILLINGS, *Judge.*

86 (Indorsement:) United States circuit court. No. 7430. Mrs. Mary Elizabeth Story Mackie, plaintiff in error, vs. Benjamin S. Story, defendant in error. Citation to Benj. S. Story.

Marshal's return.

Received Jun' 10, 1876, by the U. S. marshal, and on the 24th day of June, 1876, served a copy hereof on Benjamin S. Story, within named, by handing the same to H. C. Miller, of the legal firm of Tainey & Miller, his atttorneys, in person in this city.

S. B. PACKARD, *U. S. Marshal,*
By S. W. REED, *D'y Marshal.*

On this 6th day of July, 1876, personally appeared before me the subscriber, S. W. Reed, and makes oath that he served a copy of the within citation, as stated in his official return hereon.

S. W. REED, *D'y U. S. Marshal.*

Subscribed and sworn to before me this 6th day of July, 1876.

F. B. VINOT, *U. S. Comm'r.*

87 THE UNITED STATES OF AMERICA:

Circuit court of the United States, district of Louisiana.

The President of the United States to Hamden Story, Clement Story, and J. A. Fernandez, tutor, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein Mrs. Mary Elizabeth Story Mackie is plaintiff in error, and Benjamin S. Story defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 10th day of June, in the year of our Lord one thousand eight hundred and seventy-six.

EDWARD C. BILLINGS, *Judge.*

88 (Endorsement:) Hamden Story, Clement Story, J. A. Fernandez, tutor. United States circuit court. No. 7430. Mrs. Mary Elizabeth Story Mackie, plaintiff in error, vs. Benjamin S. Story, defendant in error. Citation.

On this 8 day of July, 1876, personally appeared before me the subscriber, S. W. Reed, and makes oath that he served copies of the within citation, as stated in his official return hereon.

S. W. REED, *D'y U. S. Marshal.*

Subscribed and sworn to before me this 8 day of July, 1876.

F. B. VINOT, *U. S. Comm'r.*

Marshal's return.

Received Jun' 10, 1876, by the U. S. marshal, and the 24th day of June, 1876, served a copy hereof on Hamden Story & Clement Story, within named, by handing the same to F. D. King, their attorney, in person, in the city of New Orleans.

S. B. PACKARD, *U. S. Marshal,*
By S. W. REED, *D'y Marshal.*

Received June 10, 1876, by the U. S. marshal, and on the 24th day of June, 1876, served a copy hereof on J. A. Fernandez, tutor, by handing the same to Sambola & Ducros, attorneys for said Fernandez, in person, in the city of New Orleans.

S. B. PACKARD, *U. S. Marshal,*
By S. W. REED, *D'y Marshal.*

89 *Assignment of errors for the legal representatives of Mrs. Mary Elizabeth Story Mackie.*

In the Supreme Court of the United States.

MRS. MARY ELIZABETH STORY MACKIE, Joseph Anthony Fernandez, tutor of the minors Story, plaintiffs in error,
vs.
BENJAMIN S. STORY, DEFENDANT IN ERROR.

Assignment of general and special errors in the Supreme Court in a judgment for the plaintiff in the court below.

Before the Supreme Court of the United States come, Doctor James Monroe Mackie, Benjamin Story Mackie, Fergus Monroe Mackie, the legal representatives of Mrs. Mary Elizabeth Story Mackie, now deceased, and say that in the record and proceedings aforesaid there are manifest errors, in this, to wit:

90 1st. That on the trial of this cause the counsel for Mrs. Mary Elizabeth Story Mackie offered the testimony of a number of witnesses tending to prove the situation and condition of the testator, Norman Story, and of all the parties to this suit at the date of the will and at the death of the testator, Norman Story, in order that the court might read the will by the light of surrounding circumstances, and interpret and construe it according to the intention under which it was written.

And counsel offered to establish by said witnesses that at the date of the will there were living the testator, Norman Story, his brother Benjamin Story, and Henry Clement Story, and his sister Mary Elizabeth Story Mackie.

That the testator, Norman Story, was never married and both his father and mother were dead.

That Benjamin was not married, at the date of the will, and though now married has not had any children.

That Henry Clements Story was the oldest of all, was married at the date of the will, and had then eight children, who are now living;

91 that he died poor, leaving no property; was the favorite brother of Norman; that Norman was the youngest of the family and lived with *with* his brother, Henry Clements, and was in the habit of assisting him pecuniarily.

That Benjamin is now, and was rich at the date of the will; that Mrs. Mary Elizabeth Story Mackie had, at the date of the will, several children that are now living.

That the plaintiff, Benjamin S. Story, has privately agreed with some of the children of Henry Clements Story, parties to this suit, that he would give to them a whole or a portion of the property he would or might recover by this suit, although the judgment of the court might be against them.

The counsel for the plaintiff, Benjamin S. Story, in the court below, objected to the introduction of this evidence on the ground that it was not admissible for the purposes for which it was offered.

The court maintained the objection and excluded the evidence, and counsel for the plaintiffs in error took bills of exceptions, as will appear by the bill of exceptions taken in this cause.

92 2nd. On the trial of this cause, it being admitted by all the parties in interest, and it appearing by the record, that Norman

Story died on the 28th January, 1875, leaving neither ascendants nor descendants, and only his brother and sister, viz: Benjamin S. Story, Mrs. Elizabeth Story Mackie, and the children of his deceased brother Henry Clement Story, eight in number, viz: Hampden Story, Clement Story, Augusta Story, Saxon Story, Anna Eliza Story, Lesseps Story, Sidney Story, Grace Story, the six latter represented by their tutor, J. A. Fernandez.

That Henry Clement Story died on the 8th February, 1868, leaving the aforesaid eight children now living.

That Norman Story died leaving an olographic will in the words and figures following:

"NEW ORLEANS, *April 24th*, 1867.

"I, Norman Story, of this city of New Orleans, of sound body
93 and of sound mind, but having the uncertainty of life in view, do write this my last olographic will and testament, hereby expressly revoking all other wills and testaments by me written.

"1st. I appoint my brother Benjamin S. Story to act as executor of this my last will (without security.)

"2nd. It is my wish that all my just debts shall be paid without delay.

"3rd. I will and bequeath to Henry C. Story and Benjamin S. Story all properties I die possessed of, to be divided equally between them.

"This my last olographic will and testament I have entirely written and now proceed to sign at this city of New Orleans, on this 24th day of April, 1867.

(Signed) "NORMAN STORY."

That the share claimed by Mrs. Mary Elizabeth Story Mackie largely exceeds the sum of six thousand dollars, and it being proved that said will has been duly probated; that Benjamin S. Story had accepted unconditionally the legacy contained in the will by applying to the second district court of the parish to be recognized as sole heir of the deceased
94 Norman Story under the will, and to be put in possession of all his estate; and it being proved that said deceased left an estate of real and personal property in this parish, exceeding in value seventy-five thousand dollars, and the evidence herein closed on both sides.

Whereupon counsel for Mrs. Mary Elizabeth Story Mackie, one of the defendants, on the trial of the cause, moved the court to decide and decree that the testamentary disposition in favor of Henry Clement Story became null and void, and without effect, by reason of his death before that of the testator; that the disposition in his favor lapsed, and the share that he would have taken had he survived became intestate estate, and belonged to the next of kin of the testator, Norman Story.

And moved the court to decide and decree her to be one of the lawful heirs of Norman Story, deceased, and entitled to one-fourth of his estate, and to put her in possession thereof.

But the court refused so to decide and decree, but, on the contrary,
95 decided and decreed "that the plaintiff Benjamin S. Story be recognized and decreed to be the sole heir of Norman Story by virtue of his last will and testament; that in *in* his capacity of sole heir said Benj. S. Story is hereby decreed to be put in possession of all the estate real and personal left by said Norman Story at his decease, and that the demand of the defendants, Mary Elizabeth Story Mackie, of Hampden Story, of Clement Story, and of the minors Augusta Story, Saxon Story, Lesseps Story, Sidney Story, and Grace Story to be recog-

nized as heirs of said Norman Story be rejected, and that the said defendants pay the costs of this suit."

To the ruling, decision, and decree of the court counsel for Mrs. Mary Elizabeth Story Mackie then and there excepted, as will appear by the bill of exception taken in this cause.

3rd. And for further assignment of error the aforesaid legal representatives of Mrs. Mary Elizabeth Story Mackie say:

96 That by the law of the land said judgment ought to have been given against the claim of Benjamin S. Story, and in favor of Mrs. Mary Elizabeth Story Mackie, decreeing her to be the lawful heir of Norman Story, deceased, and entitled to one-fourth of his estate and putting her in immediate possession thereof.

They pray that the judgment aforesaid be reversed and annulled, and altogether held for nothing, and that they may be restored to all things which are lost by occasion of the said judgment.

GEO. L. BRIGHT,
Atty. for the Legal Representatives of Mrs. Mackie, Plaintiff in Error, No. 9 Commercial Place, New Orleans.

(Indorsement on cover:) No. 764. Louisiana C. C. U. S. James Monroe Mackie, Benjamin Story Mackie, and Fergus Monroe Mackie, legal representatives of Mrs. Mary E. Story Mackie, deceased, and Joseph Anthony Fernandez, tutor of the minors Story, plaintiffs in error, vs. Benjamin S. Story. Filed 9th October, 1876.

SUPREME COURT OF THE UNITED STATES.

Brief for Plaintiffs in Error.

BENJAMIN S. MACKIE AND
FERGUS MONRO MACKIE AND
DOCTOR JAMES MONRO MACKIE,
REPRESENTING MRS. MARY ELIZABETH STORY MACKIE
AND J. A. FERNANDEZ, TUTOR OF THE MINORS
AUGUSTA STORY,
SAXON STORY,
ANNA ELIZA STORY,
LESSEPS STORY,
SIDNEY STORY,
GRACE STORY, PLAINTIFFS IN ERROR.

vs.

BENJAMIN S. STORY, DEFENDANT IN ERROR.

Error to the United States Circuit Court for the District of Louisiana.

GEO. L. BRIGHT,
Counsel for Plaintiffs in Error.

December, 1876.

L. Graham & Co., print. 73 Camp street. 2d floor

SUPREME COURT OF THE UNITED STATES.

Brief for Plaintiffs in Error.

BENJAMIN S. MACKIE AND
FERGUS MONRO MACKIE AND
DOCTOR JAMES MONRO MACKIE,
REPRESENTING MRS. MARY ELIZABETH STORY MACKIE
AND J. A. FERNANDEZ, TUTOR OF THE MINORS
AUGUSTA STORY,
SAXON STORY,
ANNA ELIZA STORY,
LESSEPS STORY,
SIDNEY STORY,
GRACE STORY, PLAINTIFFS IN ERROR.

vs.

BENJAMIN S. STORY, DEFENDANT IN ERROR.

Error to the United States Circuit Court for the District of Louisiana.

STATEMENT.

Norman Story died, leaving a brother, Benjamin S. Story; a sister, Mary Elizabeth Story Mackie, and eight children of a deceased brother, Henry Clement Story; the minor children, six in number, are represented by J. A. Fernandez, tutor.

Norman Story left a will, as follows:

"NEW ORLEANS, April 24, 1867.

"I, Norman Story, of this city of New Orleans, of sound body and of sound mind, but having the uncertainty of life in view, do write this my last will and testament, hereby expressly revoking all other wills and testaments by me written.

"1st. I appoint my brother, Benjamin S. Story, to act as executor of this my last will (without security).

"2d. It is my wish that all my just debts shall be paid without delay.

"3d. I will and bequeath to Henry C. Story and Benj. S. Story, all properties I die possessed of, to be divided equally between them."

Henry Clement Story died before the testator.

Mrs. Mary E. Story Mackie the sister and J. A. Fernandez, tutor of the minor children of Henry Clement Story, the brother mentioned in the will contend that the testamentary deposition in favor of Henry Clement Story lapses and goes to the next of kin, because he died before the testator.

Benjamin S. Story contends he takes the whole estate by accretion.

The Circuit Court rendered judgment in favor of Benj. S. Story.

Hampden Story and Clement Story the major children of H. Clement Story, assented to the judgment and do not ask relief therefrom, and do not prosecute the writ of error.

The cause was tried without a jury. The writ of error is prosecuted by the representatives of Mrs. Mary E. Mackie and by J. A. Fernandez, tutor of the minor children of Henry Clement Story and comes up upon the following

ASSIGNMENT OF ERRORS.

On the trial the plaintiffs in error offered the testimony of a number of witnesses tending to prove the situation and condition of the testator Norman Story, and of all the parties to this suit at the date of the will, and at the death of the testator Norman Story, in order that the Court might read the will by the light of surrounding circumstances and interpret and construe it according to the intention under which it was written; and to establish by said witnesses that at the date of the will there were living the testator Norman Story, his brothers Benjamin Story and Henry Clement Story, and his sister Mary Elizabeth Story Mackie; that the testator Norman Story was never married and both his father and mother were dead; that Benjamin was not married at the date of the will and though now married has not had any children; that Henry Clement

Story was the oldest of all; was married at the date of the will and had then eight children who are now living; that he died poor, leaving no property, was the favorite brother of Norman; that Norman was the youngest in the family and lived with his brother Henry Clement, and was in the habit of assisting him pecuniarily.

That Benjamin is now, and was rich, at the date of the will; that Mrs. Mary Elizabeth Story Mackie had at the date of the will several children that are now living.

That the plaintiff, Benjamin S. Story, has privateiy agreed with some of the children of Henry Clement Story, parties to this suit, that he would give to them a whole or a portion of the property he would or might recover by this suit, although the judgment of the Court might be against them.

The counsel for the plaintiff, Benjamin S. Story, in the Court below, objected to the introduction of this evidence on the ground that it was not admissible for the purposes for which it was offered.

The Court maintained the objection and excluded the evidence, and counsel for plaintiffs in error took bills of exceptions, as will appear by the bill of exceptions taken in this cause.

2nd. On the trial in this cause, it being admitted by all the parties in interest and it appearing by the record that Norman Story died on the 28th of January, 1875, leaving neither ascendants nor descendants, and only his brother and sister, viz., Benjamin S. Story, Mrs. Elizabeth Story Mackie, and the children of his deceased brother, Henry Clement Story, eight in number, viz: Hampden Story, Clement Story, Augusta Story, Saxon Story, Anna Eliza Story, Lesseps Story, Sidney Story, Grace Story, the six latter represented by their tutor, J. A. Fernandez.

That Henry Clement Story died on the 8th of February, 1868, leaving the aforesaid eight children now living.

That Norman Story died leaving an olographic will in the words and figures following:

NEW ORLEANS, April 24, 1867.

I, Norman Story, of this city of New Orleans, of sound body and of sound mind, but having the uncertainty of life in view, do write this my last olographic will and testament, hereby expressly revoking all other wills and testaments by me written:

1st. I appoint my brother, Benjamin S. Story, to act as executor of this, my last will, (without security.)

2nd. It is my wish that all my just debts shall be paid without delay.

3rd. I will and bequeath to Henry C. Story and Benjamin S. Story all properties I die possessed of, to be divided equally between them.

This, my last olographic will and testament, I have entirely written and now proceed to sign at this city of New Orleans, on this 24th day of April, 1867.

(Signed:) NORMAN STORY.

That the share claimed by Mrs. Mary Elizabeth Story Mackie largely exceeds the sum of six thousand dollars, and it being proved that said will has been duly probated, that Benjamin S. Story had accepted unconditionally the legacy contained in the will by applying to the Second District Court of the parish, to be recognized as sole heir of the deceased, Norman Story, under the will and to be put in possession of all his estate, and it being proved that said deceased left an estate consisting of real and personal property in this parish, exceeding in value seventy-five thousand dollars, and the evidence herein closed on both sides.

Whereupon, counsel for Mrs. Mary Elizabeth Story Mackie, ~~one of~~ and the defendants, on the trial of the cause, moved the Court to decide and decree that the testamentary disposition in favor of Henry Clement Story became null and void, and without effect by reason of his death before that of the testator, that the disposition in his favor lapsed, and the share that he would have taken had he survived became intestate estate, and belonged to the next of kin of the testator, Norman Story.

J. A. Fernandez Tutor

And moved the Court to decide and decree her to be one of the lawful heirs of Norman Story, deceased, and entitled to one-fourth of his estate and to put her in possession thereof.

But the Court refused so to decide and decree, but on the contrary decided and decreed

"That the plaintiff, Benjamin S. Story, be recognized and decreed to be the sole heir of Norman Story, by virtue of his last will and testament: that in his capacity of sole heir, Benj. S. Story is hereby decreed to be put in possession of all the estate, real and personal, left by said Norman Story, at his decease, and that the demand of the defendants, Mary Elizabeth Story Mackie, of Hampden Story, of Clement Story, and of the minors Augusta Story, Saxon Story, Lesseps Story, Sidney Story and Grace Story to be recognized as heirs of said Norman Story be rejected and that the said defendants pay the costs of this suit."

I. The Court erred in rejecting the evidence. The object of the Court is to ascertain the intention of the testator, whether he intended that in case his brother, Henry Clement Story, died before him, leaving a large and destitute family, Benjamin should take the whole. We think the situation of the parties, the ties which connected the testator with the parties to this suit and the legatees—the affection subsisting between them—the motives which may reasonably be supposed to operate with him, and to influence him in the disposition of his property are all entitled to consideration to ascertain the intention of the testator.

The evidence is not offered to supply or contradict, enlarge or vary, the words of the will nor to explain the intention of the testator. For such a purpose it would not be admissable... 1 Redfield on Wills, p. 501, 502, 4th ed.

But it is admissable to put the Court in the place of the testator. 1 Redfield, p. 496.

In Miller vs. Fitchborn, 3 Pa. St. 257, the Court said speaking of a will, when it was written, the object of the testator's thoughts were his estate, and the family or friends to whom he desired to leave it. To the judge all these matters must be ex-

plained by admissions or by testimony, else he cannot apply it. See also Wells on questions of law and facts § 30.

Grlf. Ev. § 287 says: there is no *material difference* of principle, in the rules of interpretation, between *wills and contracts* except what naturally arises from the different circumstances of the parties. The object in both cases is the same, namely, to discover the intention. And to do this, the Court may, in either case, *put themselves in the place of the party* and then see how the terms of the instrument affect the property or subject matter. With this view, evidence must be admissible of all the circumstances surrounding the author of the instrument.

§ 288. It is only in this mode, that parol evidence is admissible (as is sometimes, but not very accurately, said), *to explain written instruments.*

See also the authorities quoted. 1 Redfield, p. 426.

We think the evidence should have been admitted, to put the Court in the place of the testator—to let the Court know that the testator was the youngest of the family and Henry Clement Story was the eldest, had eight children, and Benjamin was not married—that the testator lived with Henry Clement Story, and was under greater obligations to him and his family than to Benjamin. That Benjamin was rich and Henry C. Story and his family were poor.

And we think that the evidence should have been admitted to show that Benjamin made a secret agreement with some of the children of age of Henry Clement whereby they would permit him to have the judgment as prayed for, but nevertheless give them their share.

It is the intention of the testator we are seeking—the understanding of that intention by Benjamin is a material fact to be known by the Court.

We hope the Court will not find it necessary to remand the cause for the evidence, but will decide there is no accretion in favor of Benjamin from the language of the will.

II. We now come to the second error assigned.

Does Benjamin S. Story take the whole estate under the will?

The article, Civil Code, 1697, provides: "The testamentary disposition becomes without effect if the person instituted or the legatee does not survive the testator."

Article 912, C. C.: "If a person dies leaving no descendants, nor father nor mother, his brothers and sisters, or their descendants, inherit the whole succession to the exclusion of the ascendants and other collaterals."

He claims the whole estate by right of accretion, alleging that the legacies made to "Henry C. Story and Benj. S. Story, to be equally divided between them," is made to them *conjointly* and that accretion takes place when a legacy is made to several *conjointly*. He rests his claim on Art. C. C. 1707, which provides:

"Accretion shall take place for the benefit of the legatees in case of the legacy being made to several *conjointly*.

"The legacy shall be reputed to be made conjointly when it is made by one and the same disposition, without the testator's *having assigned the part of such co-legatee in the thing bequeathed*."

These articles of the Civil Code have no more force than if they were not in the Code. They are simply rules of interpretation that would exist without being in the Code. They say the will of the testator must be carried into effect. If the testator intended that the legacy made to several should revert to the survivors in case of the death of one, then it must so revert, if he did not intend that in case one died the others should take the whole, then the share of the deceased one must go to the next of kin.

We say the Article of the Code has no force, because we find in every country decisions on the point, and the interpretations invariably followed is to enforce the will of the testator. In the common law two legal terms are used in such cases.

When a legacy is made to several persons with the intention that the survivors should not take the share of the deceased legatee, it is said to be made *severally* and creates between the legatees *a tenancy in common*.

Bouvier L. D. V. Several, says, "a several inheritance is

one conveyed so as to descend or come to two persons separately by moieties. Several is usually opposed to joint."

Blackstone, Vol. 1, marginal p. 194, says: "An estate given to A and B, *equally to be divided between them*, though *in deeds* it hath been said to be a joint tenancy (for it implies no more than the law has annexed to that estate, viz: divisibility), yet in *wills* it is certainly a tenancy in common because the devisor may be presumed to have meant what is most beneficial to both the devisees, though his meaning is imperfectly expressed."

When the legacy is made to several persons with the intention that the survivors should take the share of any deceased legatee, it is said to be made jointly—conjointly—to a class, and creates between the legatees *a joint tenancy.*

The question, stripped of unnecessary difficulties, is one of interpretation.

What was the intention of Norman Story? Did he intend to give the whole of his estate to Benjamin S. Story if his brother, Henry Clement Story, died before him? We think not.

The intent of the testator is the cardinal rule in the construction of wills. It is the polar star that directs the Court in the construction of wills. See the many decisions in 1 Brightley's Fed. Dig., p. 862.

In Smith vs. Bell, 6 Pet., S. C. R., p. 75, Justice Marshall said: "The first and great rule in the exposition of wills, to which all other rules must bend, is that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law." Doug., 322; 1 Black. Rep. 672. This principle is generally asserted in the construction of every testamentary disposition. It is emphatically the *will* of the person who makes it, and is defined to be "the legal declaration of a man's intentions, which he wills to be performed after his death." 2 Black. Com. 499. These intentions are to be collected from his words, and ought to be carried into effect if they be consistent with law. In the construction of ambiguous expressions the situation of the parties may very properly be taken into view. The ties which connect the testator with his

legatees, the affection subsisting between them, the motives which may reasonably be supposed to operate with him and to influence him in the disposition of his property, are all entitled to consideration in expounding doubtful words and ascertaining the meaning in which the testator used them."

When Norman Story made the will he intended to give one half of his estate to Henry Story and the other half to Benjamin Story. His intention is clear, to give one-half to each, he says, to be equally divided between them.

He did not give to them *in solido*, to each, the whole ownership of his estate, but he gave to each separately and severally one-half. What was given to one was not given to the other. He did not contemplate that Henry Clement Story would die before him. He did not intend if Henry Clement Story should die that Benjamin should take the whole. Had he so intended he would not have assigned the part of each. When he gave one-half to Benjamin, he did not intend to give him all. Therefore, that which he did not give him, did not enlarge his estate, but produced an intestacy as to that half.

The rule is, when a legacy is made *severally*, there can be no accretion—when it is made jointly or conjointly, or to a class, there is accretion. This rule is supposed to convey the intention of the testator. It is not even inflexible. It is not to be carried so far as to defeat the plain intent of the testator. Two wills may be alike and a different construction given to each. 67 Pa. St. 463.

In Bolleo vs. Smith, 39 Conn., p. 218. The will omitting the unnecessary parts is as follows:

"I give and devise unto Frederic M. Smith, Valentine W. Smith, and Timothy W. Smith, sons of my late brother, Roswell Smith, and to their heirs and assignees forever, *equally*, the residue of my estate, both real and personal, by their paying the legacy bequeathed to my wife, and also to the legacies hereinafter named."

The Court said: The first question arises under the residuary clause. Timothy W. Smith, one of the three brothers to whom the residuum was given by the will, died during the

lifetime of the testator; and the question is, whether the share that he would have taken, had he survived, has become intestate estate, or goes to the survivors.

It is a general rule of construction that where a legacy is given two or more persons, *nominatim* to be equally divided among them, and one of them dies before the testator, his share will become intestate; but where the legacy is to two or more *as a class*, the share of a deceased legatee goes to the survivor or survivors. *Prima facie* joint legatees take as a class; otherwise where the legacy is given to them as tenants in common.

All these rules, however. yield to the manifest intention of the testator, as gathered from the whole will, viewed in the light of the surrounding circumstances.

Our purpose is to discover the presumed intention of the testator.

The legatees are described as "sons of my late brother, Roswell Smith; and the case shows that they were all of his sons. If there was nothing else in the case it would be clear that they would take as a class, but the will names all the sons, and provides that they shall take equally: That alone indicates an intention that they should take as tenants in common.

Thus far the language used by the testator gives no certain indication of his will in this respect. We must, therefore, look further for his intention.

The first clause gives to his wife an annuity of two hundred and fifty ($250) dollars per year, payable semi-annually during life; and then provides that four cords of wood shall be furnished her annually, cut, split and piled in the woodhouse ready for use; and the use of a horse to go to church twice a month. Following the residuary clause are several pecuniary legacies. He then disposes of the residue to his three nephews, sons of his brother Roswell, "upon their paying the legacy bequeathed to my wife, and also the legacies hereinafter named."

From this it is apparent that the obligation imposed upon

the devisees to pay the other legacies, and provide for the widow, is a joint obligation. There is no ground for saying that each one was to pay one-third of the pecuniary legacies; and in respect to the other duties imposed, they can not be conveniently separated.

It would be absurd to contend that the testator intended that each one separately should furnish one-third of the firewood, and in like manner furnish a horse for attending church twice a month.

The only condition, therefore, upon which the legacy could take effect was a joint obligation to be assumed by the legatees. That clearly indicates that the testator intended that it should be a joint legacy. The fact that the legatees are named and are to have an equal interest, will hardly overcome the presumption arising from the fact that they are also spoken of as a class, and that as such, a joint duty devolves upon them as a condition of their enjoyment of the legacy. It is true that by the law of Connecticut, the survivors, in ordinary cases of joint tenancy, do not take the whole estate. But the argument does not depend upon the *jus accrecendi*. If they are joint tenants, *prima facie*, they take as a class. If they take as a class the lapsed legacy goes to the survivors.

In the next place we will briefly consider the circumstances and conditions of the testator, in respect to his relations and the natural objects of his bounty. He had no lineal heirs and no brothers or sisters living. His nearest relations were nephews and nieces, children of two brothers and one sister. The children of his brother Daniel lived in Wisconsin; the children of his sister Hannah Ayer, lived in the State of New York. The sons of his brother Roswell had lived with the testator from boyhood, giving him their time and labor in his business, and without compensation therefor, except their living, and their services had materially assisted in making the estate held by him when he made his will and when he died. Under the circumstances it was natural and just that he should give the bulk of his property to them. His other relations had been provided for specially, and he evidently had given

them all that he intended they should have. The balance of his property, whether more or less, he manifestly intended should descend to his nephews. Had the will been made after the death of Timothy we see no reason to doubt that the same property would have been given to the surviving brothers, and upon the same terms and conditions. Had he contemplated the death of any one of these during his life time, it is highly probable that he would have made express provision that the survivors should take the whole. Be that as it may, experience and observation teach us that the condition and circumstances of the testator may fairly be presumed to have led his mind to this course; and when we look at the language of the will and find that it will bear that construction, as well, at least, as any other, we can not hesitate to adopt it as the true one."

In Duffie, administrator, vs. Buchanan and wife, 8 Ala., p. 29, the testator said: "It is my will and desire that * * *shall be equally divided* between my mother, Margaret Gillespie, and my two sisters, Harriet Williams and Mary Gillespie." Ormond, Judge: "We consider the true construction of the will to be that the mother and the two sisters took each one-third part of the estate. The language is 'shall be equally divided between my mother and my two sisters, Harriet and Mary.' If the term *equally* had been omitted there might have been some plausibility in the argument that it was intended to create two classes of beneficiaries."

In Nancy Johnson, et al., vs Anthony M. Johnson, et al., North Carolina Rep., Iredell's Equity, Vol. 3, p. 426, the testator bequeathed to, as follows: "I give and bequeath to my wife and her *six* children all the balance of my money and other property not heretofore disposed of, *to be equally divided between them*, and their heirs, share and share alike; my granddaughter, Amaryllis Shearin, having no part of the money or property."

The Court said, p. 429: "But it remains to be seen how the residue, consisting of those lapsed legacies and the rest of the property, is affected by the death of Francis M. Johnson, one of the residuary legatees. We think so much of the residue as

that person would have been entitled to had he survived his father, does not by his death go to the surviving residuary legatees, but lapsed and belong to the next of kin."

"A distinction prevails in England in such cases between legacies given to two or more, jointly or in common. The former, upon the death of one of the donees, survives to the others, whether the death be before or after the testator's. Webster vs. Webster, 2 Pr. Wms., 347; Morly vs. Bird, 3 Ves., 628. That is suppesed to result from the right of survivorship incident to a joint tenancy. Whether that be the reason or not, or whether our act of 1874, destroying the *jus accrescendi*, will have any effect upon the point here, it is not material to to inquire in this case, since the words of this will clearly create a tenancy in common. As to that the rule is well settled. If a personal fund be given to two or more to be divided in certain proportions, and one of them die before the testator, what was given to that person lapses; and where the subject of such gift is a residue the lapsed share is necessarily undisposed of and belongs to the next of kin, for each of the donees is, by the terms of the gift, entitled to a distinct and determinate share of the residue; and, therefore, that share is not enlarged by the death of the donee of another share. Page vs. Page, 2 Pr. Wms., 489; Owen vs. Owen, 1 Alk., 494; Ackroyd vs. Smithson, 1 Bro., C. C., 503.

This gift is to "the wife and her six children equally to be divided between them, share and share alike." There is, therefore, a clear tenancy in common, so as to bring the case within the general rule. Nor does it fall within the exception to that rule, which was laid down in Viner vs. Francis, 2 Cox, 190, where the bequest was "to the children of the testator's deceased sister, M. C., to be equally divided among them," and there were three children at the making of the will, but one died before the testator, upon which it was held that the gift was not to those children *nominatim*, nor as if they had been "to the *three* children of M. C.," but it was to the children as a *class*, and the meaning was that all or any of the described class that should survive the testator should take the fund.

But this will is express as to which of the testator's wives should take the residue, namely, "her six children, which she then had, equally to be divided between them." The gift is not, therefore, to a class of persons, as such *class* might exist at any subsequent period, but to *certain* persons *then* in being, and as completely identified, each of them, as if each had been designated by his or her name, and the share of each of those persons is fixed, namely, at one-seventh part of the residue. Hence, the share of one cannot be enlarged by the death of another. Ackerman vs. Burrows, 3 Ves. and Bea., 54.

The share of Francis M. Johnson in the residue, therefore, lapsed by his death, and belongs to the next of kin."

In the matter of Provenchere's Estate, 1 Legal Gazette Reports, Campbell, Pa. Rep., p. 68, the will was as follows: "* * * * to the use of my grandchildren, Amelia, Lize, Ferdinand and Mary, share and share alike."

The Court said: "What, then, was the general intention? Clearly to provide for his daughter-in-law and her children, *not as a class*, but as individuals; hence, he not only names them each, but declares they shall take 'share and share alike.' Now, while as a general rule, residuary legatees take as joint tenants, yet where words of severance are used, the general rule gives way and it requires no authority to prove that the words '*share and share alike*' are just the words which destroy the joint tenancy."

CIVIL LAW.

The question is only one of interpretation. The object is to ascertain the meaning of a testator. Rules of interpretation do not properly belong to a Code. Including them in a Code gives them no additional weight, than what they possess by reason of their inherent equity. Nevertheless, we find the rule in our Civil Code taken from the Code of Napoleon.

Civil Code, Art. 1707, under title Donations and Testament (C. N. 1040–1045) says:

Art. 1707, "Accretion shall take place for the benefit of the

legatees, in case of the legacy being made to several *conjointly.*

"The legacy shall be reputed to be made conjointly when it is made by one and the same disposition *without the testator's having assigned the part of such co-legatee in the thing bequeathed.*"

Art. 1708. "It shall also be reputed to be made conjointly when a thing, not susceptible of being divided without deterioration, has been given by the same act to several persons, even separately."

To an ordinary mind, if a testator assigns one-half to Benjamin and the other half to Henry the legacy is not made conjointly, and one-half to Benjamin and the other half to Henry, is equivalent to the term "to be divided equally between them" used in the will before the Court. But the ingenuity of lawyers have so confounded and obscured the rule of interpretation that to follow them one could not tell whether one-half is equal to one-half.

We request the Court to decide that by the will of Norman Story, the share of Benjamin S. Story was not enlarged by the death of Henry Clement Story, and the part of Henry Clement Story does not go to Benjamin, but to the heirs of Norman Story *ab intestato.*

The Roman law, which is the foundation of this right of accretion, has recognized three ways in which legatees of one and the same thing may be linked or joined together in a testament. Domat § 3271.

The *first* is that which joins them by the *thing* itself that is devised to them, although they be not joined by one common expression; as if a testator institutes in the first place one executor or legatee, and then institutes a second by another clause, without distinguishing their shares or portions; or if he gives a house to a legateee, and gives afterward and separately the same house to another legatee by another clause.

Example:

I bequeath my property to Peter.
I bequeath my property to John.

I bequeath my house to Francis.
I bequeath my house to James.

This is called conjointly, *in re.*

The *second* manner is that which joins together the executors or legatees, both by the thing and by the expression of the testator; as if he instituted such a one, and such a one his executor or legatee, both by the thing and by the expression of the testator: as if he instituted such a one, and such a one his executors; or if he gives to such a one, and such a one a house or some lands.

Example:

I bequeath my property to Peter and John.
I bequeath my house to Francis and James.

This is called conjointly *re et verbis.*

The *third* is that which joins the persons together only by the word and not by the thing: as if a testator devises a land or tenement to such a one, and such a one by equal portions.

Example:

I bequeath my property to Pedro and Pablo, to be equally divided between them.

I bequeath to José one-half of my vineyard; and to Joaquim the other half.

This is called verbal conjunction, or *in verbis.*

Domat's Civil Law, Book III of Testaments, Tit. 1, Sec. 9, wherein you will find the references to the Roman law, and generally the law itself, says:

SECTION XI.

If a testator bequeaths one and the same thing to two or more legatees without any mention of portions, as, if he gives and bequeaths a house to such a one and such a one, these legatees being *conjoined* by the *thing* bequeathed, there will be between them a Right of Accretion, in the same manner as if the testator had added, that the thing should belong entirely to him of the two legatees who should be left alone to reap the Benefit of the Legacy.

Thus it is only their concurrence that divides the legacy between them, and gives to every one his part of it; and if one of them can not, or will not receive his portion, it remains to those who have taken or shall take theirs.

SECTION XII.

If a testator had bequeathed the same thing to two legatees by two different expressions and separately as if having bequeath a house by a first clause to a first legatee, he bequeathed it again afterwards to another legatee by another clause, such a legacy might be conceived in three manners, which would have three different effects. The first in such a manner, as that on the second legacy the intention of the testator should appear to be to revoke the former; and in this case the first legacy would remain null. The second, so as that he would have each of the legatees to have the whole legacy, the house going to one and the heir being charged to give the value of it to the other legatee, which would be executed provided the said intention were express and clearly explained. The third is if, by the two clauses of the testament, the house were bequeathed entire to each of the two legatees; and in this case, they both, accepting the legacy, their concurrence would divide it, and each of them would have the half of the thing bequeathed in this manner.

But if in this last case there should be one of the two legatees who either could not, or would not, have any share in the legacy, the whole would belong to the other; not so much by right of accretion, as that because the whole was given him, and that his right not being diminished by the concurrence of the other, it would remain entire to him, but with the charges which ought to pass to this legatee, according as the disposition of the testator should demand it; for their might be some of the charges limited to the person of the other legatee who would take nothing.

SECTION XIII.

If the same thing is bequeathed *to two or more legatees, but so as that the testator divided it among them*, as if he bequeathed

it to them by equal portions, or assigns to every one his own, there will be *no right of accretion among them;* for this title divides them, and gives to every one his right to his legacy separate from that of the others, and restrained to his own portion. So that if any one of the portions of these legatees should become vacant, the others would have no right to it; but it would go either to the heir or executor, if it was he that was charged with the legacy, or to a legatee, if the testator had charged one legacy with this other; or if he had devised a land or tenement to a legatee, and had charged him to give to others a portion of the said land, or the usufruct of the whole, or of a part thereof, or a sum of money to be divided among them.

Escriche, the famous Spanish commentator, speaking of accretion and conjointly VERBO ACCRECENCIA, we think he simplifies the matter better than any other writer, always excepting Marcardé, who adopts nothing that is not logical.

Escriche says—we translate:

The co-heirs or co-legatees can be called conjointly to one thing in three ways, viz: by *real* conjunction, by *verbal* conjunction, by conjunction *mixed* of real and verbal.

There is *real* conjunction when the testator gives the same house to two or more persons, in one and the same testament, but in separate clauses, as if he said *I bequeath my property to Peter; I baqueath my property to John;* I bequeath my house to Francisco; I bequeath my house to Diego.

There is *verbal* conjunction, when the testator calls two or more persons to the same thing, but with the expressed declaration that he does not give to each, except a certain determinate part, as if he says: *I give my property to Peter and to Pablo in equal parts, or: I bequeath to Joseph the half of such a vineyard, and to Joaquim the other half.*

There is lastly *mixed* conjunction, of real and verbal when the testator gives the same thing, to two or more persons simply by one clause and without division of parts—as if he said—*I give my property to Louis and to Leandro, or: I bequeath*

to Roque & Manuel an olive plantation that I have in such a place.

In the *real* conjunction there exists the right of accretion, and thus, in the examples given, Pedro and Juan will divide among themselves in equal parts the property of the deceased testator, and if either of them do not exist, or are not present the other will take all the inheritance. In the same way Francisco and Diego will divide equally among themselves the house, and if Diego does not exist, his part will go by accretion to Francisco. If the two legacies were contained in two separate wills they would be incompatible, and the first would be considered revoked by the second; but, being contained in the same instrument, we cannot impute to the testator irreconciliable intentions, and it is to be presumed that he desired the two institutions of heirs, or the two legacies to be considered one institution or one bequest, by the concurrence of the co-heirs or co-legatees, and that it shall belong in whole to one of them in case the other does not exist or cannot take his part.

In the *verbal* conjunction there is no right of accretion, because as the co-heirs or co-legatees are not called except to distinct parts of the inheritance or the legacy, it may be said, speaking properly, that they are heirs or legatees of different things. Thus Pedro dying, in the example given, his part will not go to Pablo, but to the heirs *ab intestato;* and José dying, the half of the vineyard will not go by accretion to Joaquim, but will remain united to the mass of the succession. Many of the commentators on the Roman laws admit the right of accretion in the case of verbal conjunction, but the opinion most common, most in conformity to the well understood texts, sustains the doctrine that the right does not exist. This opinion prevails among us, and it may be said that it is indirectly sanctioned by the Leg. 33, tit. 9, part 6.

In the *mixed* conjunction, that is *real and verbal*, it is clear that the right of accretion exists, for if it exists when the co-heirs or co-legatees are called to the same thing by separate clauses, with much more reason will it exist when they are called to the same thing, without designation to the parts, for

the union is more close or perfect in the thing and in the words, *re et verbis*, than it is in the thing only *re*.

From all this doctrine we deduce the general rule, that the right of accretion can only exist in inheritances, as well as in legacies, when in one and the same testament a thing is given to two or more persons, undividedly and *in solido*, either in one clause or in a separate clause; so that if all concur, by the concursion, the solidary right disappears and the division is made, there is, therefore, no occasion for the right of accretion; but if any of them do not come to take his part, but he either does not wish or cannot take it, the division is not made, and the solitary action remains in favor of the other, who takes entirely the thing which had been bequeathed to them, and in which consists the right of accretion. All in conformity with Leg. 33, tit. 9, part 6.

Before the time of Justinian, accretion was a matter of positive law, separate and irrespective of the will of the testator. If the survivor had children, there was accretion for him. If he had none there was no accretion—that was for the political purpose of encouraging marriages—and this right of accretion for the present existed, although the right was only *in verbis*.

But Justinian establishes the true right of accretion, based on the law of nature, the will of the testator. Demolombe, vol. 5, Donations p. 310–315, No. 364.

He directed that the *conjuncti re et verbis* and the *conjuncti re tantum*, that are really *disjuncti*, and that legatees disjoined *verbis* but conjoined *re* are all called to the inheritance or legacy of the whole thing, by a title much stronger than that of legatees *re et verbis*, for the whole thing has been bequeathed to each separately. Ib. p. 315.

The French commentators followed in general Justinian. They sometimes erred in their views, forgeting the changes that Justinian had made. See Demolombe, No. 565, vol. 5.

Some of the anterior laws improperly and through errors of the compilers of the Code Justinian, crept into that code. Such

was the condition of things when Napoleon undertook to make this code.

The Code Napoleon provides, Art. 1044:

"There shall be ground for increase for the benefit of legatees in the case where the legacy shall be made to several *conjointly.*

"The legacy shall be taken to be made, *conjointly when it shall be so by one single and the same disposition, and when the testator shall not have assigned the proportion of any of the legatees in the thing bequeathed.*"

This is substantially the Art. 1707 of our Civil Code.

Demolombe says (p. 318).

1st. There is always accretion between legatees joined *re et verbis* (by thing and the words), the *mixed conjunction.*

2d. There is never accretion between legatees joined *verbis tantum* (by the word only.)

3d. And as to legatees joined *re tantum* (in the thing only) by the real conjunction, we must distinguish: that accretion does not exist, if the thing bequeathed can be divided without deterioration.

Accretion takes place among legatees,—conjoint, *re et verbis.*

Pothier and the old authors say the *same thing* must be given in whole to several persons, *ib.*, p. 318. There is accretion if I bequeath 100,000 fr. to Peter and to Paul, for each is legatee for the whole, otherwise if I bequeath $100,000 to Peter and Paul to be equally divided between them.

There is never accretion between legatees conjointly *verbis tantum. ib.*, p. 319. As if the testator says: I bequeath my farm one-half to Peter and one-half to Paul, *ib.*, p. 320. There can be no accretion because there is an assignment of parts.

But does every assignment of parts prohibit accretion? I bequeath my farm to Peter and to Paul for them to enjoy it and dispose of it in equal parts, * * * or to divide it between them equally.

Demolombe, p. 320, says: This question is controverted and three answers are given.

The *first* in the affirmative, contending that the assignment of parts is exclusive of the right of accretion.

The *second* that this assignment of parts (equally divided) would exist without being expressed.

The *third*, p. 323, says: ACCRETION IS IMPOSSIBLE. Demolombe says, p. 323, this is the correct doctrine. He says: If the right of accretion is not destroyed by the assignment of equal parts for a greater reason it is not destroyed by the assignment of unequal parts. He quotes Comp. Cass. 18 December, 1832; Lemonier, Dev.; 1833, I, 36; Paris, 22 Juin, 1833, Mouton D.; 1833, II, 184; Cass. 12 Fevr. 1862, Ogier, Dev.; 1862, I, 385; Toullier, t. III, No. 692; Zachariae, Aubry et Rau, t. VI. p. 293, 294.

After commenting on the several rules of interpretation Demolombe ends by saying, p. 339, he will conclude by makiag an important observation, viz: *That Arts.* 1044 *and* 1045, *C. N., contain nothing that is imperative; that they are based on the presumed will of the testator, and therefore when his will is contrary to any rules his will must prevail.*

In Sirey Code Napoleon Annote, Art. 1045, p. 470, Nos. 20, 21, we find the following authorities: There is assignment of parts, and not conjoint legacies, and therefore there is no accretion when the testator, by one and the same testament, has instituted two legatees, *each for one-half* of the thing bequeathed them.

23 Aout, 1808, Turin Recueil general des lois et des arrets par Sirey, tome 9, 2de partie, page 374; Collection Nouvelle, vol. 2, Jurisprudence generale du royaume par Dalloz, Alphabatique tome 6, page 185. Id. 18, Mai 1825, Rej.

Sirey ancien Recueil, tome 26, 1re partie, page 10. Collection Nouvelle, vol. 8.

Dolloz periodique tome 25, 1re partie, page 321. Neither is there accretion in a legacy in these words, I give to such and such person the sum of —— *to be divided between them in equal parts.*

19 Janv., 1830, Rej. Recueil general par Sirey, tome 30, 1re partie, page 73:

Collection Nouvelle, vol. 9.

Dalloz periodique tome 30, 1re partie, page 87.—Id. 31, Juill, 1828, Toulouse.

Recueil Sirey tome 29, 2de partie, page 16.

Collection Nouvelle, vol. 9.

Dalloz, periodique, tome 29, 2de partie, page 59.

Marcadé who should be considered the arbitrator of vexed questions says: Arts. 1044, 1045, to determine whether or not there is accretion for the benefit of the survivor, you must consider whether or not the legacy to him is *ad totum* or in a fraction. You must find out the intention of the testator. The intention of giving *ad totum* is not to be presumed. It must be shown by the expressed terms of the testament or by the surrounding circumstances. p. 134.

After considering the several authors who have written on the subject, he says: As accretion can only result from the will of the testator, how can you say he has given *ad totum*, when he has formerly declared he gives fractional parts. p. 136.

Marcadé considers the reasoning of those that have written on the subject. (p. 136–138.) He closes by saying, he thinks with M. Coin-Delisle, that it is wrong to decide the question in an arbitrary manner, as it is a question of intention, that can only be decided by the circumstances of the case. p. 138.

All this learned discussion, almost unintelligible, amounts to nothing more than the rule which is always applied to every testament, viz., the intention of the testator must prevail, provided it be consistent with the rules of law.

We are told the demand is made upon the authority of 4 N. S. 246; 10 Rob. 512; 10 An. 164; 18 An. 409.

We respectfully submit that an examination of these cases will show they do not support, but reject the demand.

The case of 4 N. S., 246, Parkinson, et al. vs. McDonough, et al., was not argued.

The Court says (p. 249), the counsel for the appellees did not argue the case as the decision in any way will not affect their interest. The authority of Toullier, quoted in that case has been superseded by Demolombe, Marcadé and others, as we have shown. The authority of Toullier was considered by

Demolombe when he considered the three different views that have been taken of this subject, and when he decided that the accretion was impossible. He says: "The accretion is impossible and the judicial decision, that may have permitted it' ought to be cancelled for violating Art. 1044." p. 323, No. 373.

In Prevost, and others, vs. Martel, and others, 10 Rob., 513, the Court decided where a testator died without legitimate descendants, but leaving several brothers and sisters, institutes one of them his universal heir, such universal heir or legatee will be entitled to the benefit resulting from the failure or reduction of the particular legacies, to the exclusion of the other brothers and sisters. It is evident that the question of accretion was not in the case. Certain legacies having lapsed the universal legatee took because he was universal legatee, and not by right of accretion.

The case of LeBeau vs. Trudeau, 10 Annual La. Rep. p. 165, does not present the question now before the Court. The will, translated from French to English (the translation is at the bottom of the page), is as follows:

"I, the undersigned, George Lebeau, in the enjoyment of my intellectual faculties, wishing to put my affairs in proper order, and to make my last will, and *to make known the persons to whom I bequeath my property*:—

I will first mention my debts. I owe to Miss Emma Bertrand, being her tutor, by reason of her hereditary rights growing out of the successions of her father and mother, the sum of $520. This is about all I owe, with the exception of two small accounts due merchants.

I declare that I give freedom to my young negro boy named Pericles; he shall remain under the superintendence of Elizabeth Wilson, f. w. c., until he shall attain the age of twenty-one years. In case the said Elizabeth should die, I recommend him to the care of Madame Groussard, until he comes to his majority.

After my debts paid, my property *shall be divided in equal portions* among the persons hereinafter named, that is to say: Lesine Lebeau, Polixene Bertrand, John Demourelle, Emma Bertrand, Jean Bertrand, Elizabeth Wilson, Laure Grousard, L. H. Trudeau.

I have hereinbefore mentioned the names of the persons to whom I bequeath all my property. These are my last testamentary dispositions. I will that they shall be respected."

GEORGE LEBEAU."

Fausse Riviere, 21st June, 1853.

It contains declarations of intention that show that the testator left to the legatees as a class, *ad totum*, intending that no other persons than those named should have any of his property. It says: "*wishing to make known the persons to whom I bequeath my property*, after my debts are paid, my property shall be divided in equal portions among the persons hereinafter named, that is to say, Lesine Lebeau, Polixene Bertrand, John Demourelle, Emma Bertrand, Jean Bertrand, Elizabeth Wilson, Laure Grousard, L. H. Trudeau."

"I have hereinbefore mentioned the names of the persons to whom I bequeath *all my property*."

It is evident from the language of this will that the testator desired that no one else but these should ever have any of his property—and that they should have all his property—he says so. He enforces his intention by a last sentence, "I will that they shall be respected."

The judge who decided the case was of opinion that this intention was clearly expressed.

He says: "In the interpretation of *this* will I find no difficulty in discovering the true intention of the testator, as deducible from the whole language of the instrument which he has framed to express his last wishes. If there is any obscurity or doubt as to his meaning in any particular clause, we are to bring other clauses in juxtaposition with it and deduce if possible from all an interpretation which will make them all harmonize. Approaching the will before us in this spirit, I find no difficulty in discovering the true intention of the testator. I read the will thus: I desire to dispose by this will, of all that I possess and in no respect to die intestate!

I wish my debts first paid.

"I liberate my slave; I give all the residue of my property to Lezene Lebeau, Polixene Bertrand, John Demourelle, Emma Bertrand, John Bertrand, Elizabeth Wilson, Laure Grousard, L. H. Trudeau, to be equally divided among them. *No one else is to participate in my estate. They are the persons to whom my property is to be given.* This is the true substance of the will, its unmistakable intention."

We submit to the Court that if this be the intention of the testator, of course as he gave to a class, and did not intend that any person out of those named should have any of his property, the survivors necessarily took the property under the will. Nevertheless, there are two dissenting opinions to that decision out of a Court of five Judges.

The will of Norman Story contains no such clauses as are contained in that will—no expression such as "make known the persons to whom I bequeath all my property." "I have heretofore mentioned the names of the persons to whom I bequeathed all my property." "I will that they be respected." All these are declarations tending to show intentions.

But the will of Norman Story contained nothing but "I will and bequeath to Henry C. Story and Benj. S. Story all properties I die possessed of *to be divided equally between them.*"

He made the division, and there is nothing contained in the will tending to show that if Henry Clement Story be dead his share shall go to Benjamin and not to his children according to law. There is nothing in the will tending to show that he gives all his property to Benjamin Story. He intended what he said, "*to be divided equally between them.*" which means to give one-half to Henry Clement and the other half to Benjamin.

If he did not so mean what was the use of saying "to be divided equally between them?" He never intended to do that which Benjamin is trying to do—take it all and leave Henry's family helpless and penniless.

We now come to the case of the succession of Mrs. Louis Foucher, 18 La. An., 409.

The will contained the following clause: "I name for my heirs and universal legatees, 1st. My brother François Saulet; 2d. The children of my brother, Balthazar Saulet; 3d. The children of my late sister, Mrs. V. Degruy; 4th. And the children of my other sister, the late Mrs. M. A. Foucher, Jr., such as the law itself has provided for.

François Saulet died, and the Court decided that the others took by accretion.

The decision is correct. It is our argument heretofore made.

The will contained *no assignment of parts.* It is one of the three ways that the Roman law recognizes whereby legatees of one and the same thing may be linked or joined together in a testament.

It belongs to the *second manner* of which we have written. It is like the example we have given, viz:

I bequeath my property to Peter and John.

I bequeath my house to Francis and James.

This is called conjointly, *re et verbis,* which Domat speaks of in Sec. XI, and says it is a conjoint legacy.

It is what Escriche calls the *mixed re et verbis*—conjunction which carries with it accretion.

It is what Demolombe, vol. 5, p. 308, calls the conjunction *re et verbis,* and therefore made conjointly, and what Marcardé calls *re et verbis,* and made conjointly. 1 Marcadé, p. 134, 135

But the will of Norman Story says "to be divided equally between them." The will of Mrs. Louis Foucher made no division, assigned no parts. She gave the property *in toto.*

The decisions of the State court are not against the construction we desire, and if they were, this court will not follow them. This Court said in Lane et al. vs. Vick et al., 3 How, p. 476, "with the greatest respect, it may be proper to say that this court do not follow the State courts in their construction of a will, or any other instrument, as they do in the construction of statutes." If it did it would construe in as many ways as there are States in the Union.

We respectfully submit that we have shown:

1st. The testamentary disposition becomes without effect if the legatee does not survive the testator.

2d. If a person dies leaving no descendants, nor father nor mother, his brothers and sisters, or their descendants inherit the whole succession to the exclusion of the ascendants and other collaterals.

3rd. That the evidence offered is admissible to put the Court in the place of the testator.

4th. That when a testator says he gives his estate to A and

B to be equally divided between them, and one of them dies before the testator, his share will become intestate.

5th. That when the testator gives to a class, the share of the deceased legatee, goes to the survivors.

6th. That the survivor takes the share of the deceased legatee, when the legacy is made conjointly *in re.*

7th. That the survivor takes the share of the deceased legatee when the legacy is made conjointly *re et verbis.*

8th. That the survivor does not take the share of the deceased legatee when the legacy is made *in verbis.*

9th. That the intention of the testator will override all these rules of interpretation.

We pray the Court to decree that the testamentary disposition in favor of Henry Clement Story became null and void and without effect, by reasen of his death before that of the testator, and the disposition in his favor lapsed, and the share he would have taken had he survived, became intestate and belongs to the next of kin of the testator, and consequently Benjamin S. Mackie, and Fergus Monroe Mackie, and Dr. James Monroe Mackie, representing Mrs. Mary Elizabeth Story Mackie, are entitled to one-fourth of his estate, and the six minor children of Henry Clement Story are represented by J. A. Fernandez, tutor, are entitled to the other fourth less two-eighths thereof, the share of the two major children, who have refused to prosecute the writ of error.

Benjamin S. Story is not to share in this lapsed legacy because by the will the testator did not intend he should have more than one half.

Respectfully submitted,

GEO. L. BRIGHT,
Counsel for Plaintsffs in Error.

December, 1876.

C

UNITED STATES SUPREME COURT.

No. 764

BENJAMIN S. MACKIE ET ALS., PLAINTIFFS IN ERROR,

versus

BENJAMIN S. STORY, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

JOHN FINNEY,
HENRY C. MILLER,
of Counsel for Defendant.

UNITED STATES SUPREME COURT.

No. .

BENJAMIN S. MACKIE ET ALS., PLAINTIFFS IN ERROR,

versus

BENJAMIN S. STORY, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

Norman Story died leaving the following last will:

"NEW ORLEANS, April 24, 1867.

"I, Norman Story, of this city of New Orleans, of sound body and of sound mind, but having the uncertainty of life in view, do write this my last will and tes-

tament, hereby expressly revoking all other wills and testaments by me written.

"1st. I appoint my brother, Benjamin S. Story, to act as executor of this my last will (without security).

"2d. It is my wish that all my just debts shall be paid without delay.

"3d. I will and bequeath to Henry C. Story and Benj. S. Story, all properties I die possessed of, to be divided equally between them."

Henry C. Story, one of the legatees under the will, died before the testator. The surviving legatee, Benjamin S. Story, had the will duly probated, and accepted the legacy unconditionally. Civil Code, articles 976, 979, 988. There were living, at the death of Norman Story, besides Benjamin S. Story, his brother, his sister, Mary Elizabeth Story Mackie, and eight children of the predeceased brother, Henry C. Story, six of these children being minors, represented by their tutor, and two being of age. Under the article 1707 of the Civil Code of Louisiana, accretion takes place in favor of the surviving legatee, when the legacy is made to two persons conjunctively, without assigning the part of each in the property bequeathed. Accordingly, Benjamin S. Story, having accepted unconditionally and claiming the right of

accretion, instituted suit in the Second District Court to be recognized as sole heir of the testator, to be decreed to be entitled to the whole estate left by the testator, and to be put in possession thereof. Louisiana Code of Practice, arts. 1000, 1001, 1002, 1004. Mrs. Mackie, one of the defendants, being a citizen of Pennsylvania, upon her application under the act of Congress, the suit was removed to the United States Circuit Court. See Act of Congress 30th March, 1875, 18 Statutes at Large, p. 470, s. 2. The suit was there tried and judgment rendered in favor of Benjamin S. Story, plaintiff in the suit and defendant in error here, and from that judgment Mrs. Mackie prosecutes this Writ of Error, the six minor children of H. C. Story joining in the Writ of Error, the two children of age refusing. Mrs. Mackie died after the Writ of Error was sued out, and her legal representatives were made parties here.

The question presented is one purely of law. The will and its probate, the unconditional acceptance by Benjamin S. Story, the death of Henry C. Story before the testator; that he left surviving, besides Benjamin S., his sister, Mrs. Mackie, and the eight children of Henry C. Story; the value of the estate, are all admitted in the pleadings. The bill of exceptions reserved by the plaintiffs in error to the decision of the Circuit Court in favor

of Benjamin S. Story, (Record, page 20,) incorporates all the facts herein stated, admitted by the pleadings and necessary to present the legal questions involved—whether Benjamin S. Story is not entitled to the whole estate by virtue of the will and right of accretion.

ERRORS ASSIGNED BY PLAINTIFFS.

1st. That the Court erred in excluding certain evidence offered by the plaintiffs in error, tending, as they claimed, to show the intention of the testator, (see Record, page 19 ,) which we shall discuss last.

The second error assigned is that the Circuit Court erred in not deciding that the testamentary disposition in the will to Henry C. Story lapsed and became null and void by reason of the death of Henry C. Story before the testator, and in not deciding that the share which Henry C Story would have taken had he lived did not accrue, one-fourth to Mistress Elizabeth Story Mackie, sister of the testator, and six-eights of the other fourth to the six children of Henry Clement Story, who join in this writ; and that the Court further erred in deciding that the legacy was conjoint without assignment of parts, according to

article 1707 of our Civil Code; and that by the death of Henry C. Story before the testator, the whole legacy accrued to and belonged to Benjamin S. Story by virtue of the will and the right of accretion.

We shall first discuss the ground presented in this second assignment, as to the effect of the legacy.

The question to be determined in this case arises upon the following clause in the will of Norman Story, deceased:

"I will and bequeath to Henry C. Story and Benjamin S. Story all properties I die possessed of, to be divided equally between them." See Printed Record, page .

One of the legatees named in this will, to wit: Henry C. Story, died before the testator, as appears by the bill of exceptions. Record, page 20. Under the Louisiana law,

"Accretion shall take place for the benefit of the legatees in case of the legacy being made to several conjointly. The legacy shall be reputed to be made conjointly when it is made by one and the same disposition, without the testator having assigned the part of each in

the thing bequeathed." Article 1707 Revised Civil Code of 1870, corresponding with article 1700 of the previous Code.

The effect of the conjoint legacy defined in article 1707 of the Civil Code is, that in the event of the death of one of the legatees before the testator, the legacy in its entirety accrues, by right of accretion, to the surviving legatee. See Civil Code, articles 1706, 1707, 1709.

Benjamin S. Story, the defendant in error, maintains that the legacy in this case is made to Henry C. and to him (Benjamin) conjointly; that he is entitled to the whole by reason of his co-legatee, Henry C., having died before the testator; and so the Circuit Court decided. This Writ of Error is prosecuted from that judgment by the plaintiffs in error, who are the nephews and nieces of the deceased, and who would share the succession of the deceased as legal heirs, if there was no will. It is thus apparent that the case depends upon the solution of the legal proposition: Is the legacy made to Benjamin and Henry conjointly, or, in the language of the Civil Code, has "the testator assigned the part of each in the thing bequeathed?" We think it clear, from the textual provisions of the Louisiana Code, as well as upon principle and authority, that the legacy in question is made conjointly; that by the death of Henry C. Story before the testator, the whole legacy belongs to Benjamin S. Story by right of accretion.

The right of accretion, or of survivorship in the conjoint legacy, arises from the significance the law attaches

to the terms of such a legacy, and the character of title it conveys. It is a legacy of an estate, or of a thing, to two or more persons without designation of the parts of each, in the property or thing bequeathed. Each legatee is called to the enjoyment of the same thing in its entirety. In effect, the testator says: It is my will that A. B. and C. D. shall have, after my decease, the property I die possessed of. In the event of the death of one of the legatees of the conjoint legacy before the death of the testator, it does not seem to accord with his will that his legal kindred, manifestly out of the testator's contemplation and excluded by his will, should be called in to share the estate. The law recognizes the significance of such a will, and creates the right of accretion in such a case in favor of the surviving legatee. The law presumes from the fact that the testator calls two persons to the enjoyment of his entire estate, not to take it each by a distinct share, but to take it as a whole; that the testator never intended, if one of the legatees died, that others should have the inheritance, but that he did intend, in the event of such death, the whole legacy should accrue and belong to the surviving legatee.

Mr. Duranton, one of the most eminent commentators on the Napoleon Code, in commenting on the right of accretion in legacies, expresses himself as follows: "In the cases, also, where the right of accretion exists, the fact that one of the legatees or instituted heirs does not receive the benefit of the disposition, whether because he is incapable, or because it has been revoked so far as he

is concerned, or because he refuses it, or because he dies before the testator, that fact does not interfere with the disposition receiving its full and entire execution to the profit of the other heirs or legatees, if the legacy has not failed with respect to them;" and he adds that the right of accretion is based upon the presumed will of the testator. 5 Duranton, Cours de Droit Francais, p. 168, title, du Droit d'Accroisement entre les Legataires et les Donataires. This legal presumption that it is the intention of the testator, in making the conjoint legacy, that accretion shall enure to the benefit of the legatee who survives his co-legatee, is embodied in article 1707 of the Louisiana Code, which confers the right of accretion when the legacy is made conjointly, and declares that the legacy shall be reputed to be made conjointly in the case when it is made by one and the same disposition without the testator having assigned the part of the legatees in the thing bequeathed. The conjoint legacy, defined in article 1707 of the Civil Code, is termed by the commentators on the Civil Law the conjunction "re et verbis," by which was meant that the legatees were joined in one and the same disposition or words, and they were also joined in regard to the thing; it being bequeathed to them without assignment of parts, which always gave rise to accretion between the legatees. See 2d Domat's Civil Law, Cushing's edition, page 405, No. 3272, page 414, par. 3291; 5th Toullier Droit Civil Francais, page 642, par. 684.

The opposite of the conjoint legacy, defined in article 1707 of our Code, is where the legacy is made to two per-

sons with an assignment of the parts of the legatees in the thing bequeathed, as if the testator declares, I will one-third of my estate to A. B., one-third to C. D., one-third to E. F.; and in such a legacy it is quite clear that the reasoning and the presumption completely fail, on which the right of accretion in the conjoint legacy is based. In the conjoint legacy the right of accretion exists, because the testator has bequeathed precisely the same thing to two co-persons by one and the same disposition, without designating the part of each. In the language of Mr. Duranton, "the condition of the right of accretion is that the testator shall have given to each legatee that which he has given to the other." In other words, the same thing is bequeathed by one disposition, without division of parts to two or more. (See 9th Duranton, page 489, par. 502.) Each legatee is called by the terms of the conjoint legacy to the enjoyment of the same thing in its entirety without separation of interests, or parts of the legatees in the thing bequeathed. In such a legacy, the law presumes that the testator intended, if, at his death, one only of the legatees survived, he should take the whole by right of accretion. This presumption is founded on the legacy of the same thing to two or more. But in the case of the legacy with an assignment of parts, that is, one third to A, one third to B, and one third to C, the testator has not bequeathed the same thing to each legatee, but has been careful to separate their parts, and designate what each shall take. There is in such a case no basis on which

the right of accretion can rest, for it cannot be deemed that the testator intended either of the legatees, where there is a distinct assignment of the separate part of each, should in any event get more than the separate and distinct share given to him. What the law means by an assignment of the partsin the thing bequeathed, so as to defeat accretion, is a legacy which gives distinct parts or shares in the thing bequeathed to each legatee, so as in no sense can the criterion of the conjoint legacy be applied, to-wit: that which is given to one is given to the other. This legacy, to one or more, with an assignment of the parts of each in contradistinction to the conjoint legacy, *re et verbis*, was known to the civil law as the conjunction *verbis tantum*, that is, that the legatees are joined in expression only and not with reference to the thing bequeathed; for they each take a distinct share, and of course no accretion between such legatees existed. The plaintiffs in error insist that the legacy in question here, is of this class, the conjunction *verbis tantum*, although it manifestly is of the class *conjuncti re et verbis*, defined by article 1707 of the Code, to which accretion is incidental.

See 5th Toullier, page 645, No. 690.

2d Domat Civil Law, Cushing edition, edition 1850, page 416, par. 3293.

The previous investigation into the nature of the legacy to two persons conjointly and of its opposite, the legacy with an assignment of the shares of the legatees in the thing bequeathed, and of the theory on which the law recog-

nizes the right of accretion between the legatees of the legacy made to them conjointly, and denies accretion between legatees who take separate and distinct shares, naturally leads to the consideration of the legacy contained in the will of Norman Story, in question here. The terms of this disposition or universal legacy (Civil Code, art. 1606) is: "I will and bequeath to Henry C. Story and Benjamin S. Story all properties I die possessed of, to be divided equally between them." Now, upon what line or portion of this legacy do the plaintiffs in error found their pretension that it is a legacy to two persons, not as a totality, but by distinct shares to each of them?

The reliance of the plaintiffs is on the words, "to be-divided equally between them," which close the sentence, and which the plaintiffs insist is equivalent to a legacy by distinct shares. But the last member of the sentence containing the legacy, is not to be separated and made to receive a significance which it does not possess, when the whole sentence is taken together, or even when taken by itself. The first member calls each to the totality; each is vested with a title to the whole, and clearly the words "to be equally divided between them," upon which the plaintiffs' whole case rests, does not impair in any way the unity of interest—the calling of both to the same thing, as owners, each, of the whole of that thing, so clearly expressed in the leading member of the sentence, and which is the criterion of the legacy made conjunctively, as well as of the right of accretion.

In every instance where, under article 1707 of the

Code, the testator bequeaths his property to two persons without assigning the part of the legatees, carrying with it the right of accretion, it is quite manifest that the testator contemplates the legal right the legatees would have "to divide the legacy equally between them." The words added by the testator in this case, upon which plaintiffs lay such stress, merely express what is the necessary implication in every conjoint legacy in which accretion exists between the legatees. The words, "to be divided equally between them," instead of importing an assignment of parts, as the plaintiffs claim, merely carry out and express the effect of the legacy made conjointly, without the assignment of parts. Had the testator intended to give the property by distinct shares, he surely would not have commenced by the distinct and emphatic expression which he has used, giving it as a totality to each; nor without manifest violence to the sense of the words used in the will, can such an intention be attributed to him merely because, after giving the property as a totality, he has merely expressed the legal consequence of the estate with right of accretion, that his will created. There is a formula which would readily occur when the testator wishes to bequeath distinct shares to each of two or more legatees, to-wit—I will one-fourth, or one-third, or one-half, to each. The words "to be divided equally between them," would be wholly out of place or repugnant in such a legacy. It is manifest, then, that the words "to be divided equally between them," solely relied on by plaintiffs

to create a legacy by shares, follow, and are the appropriate accompaniment of a legacy of the whole without assignment of parts, and with the right of accretion, its incident, as the Defendant in Error maintains.

Nor do the pretensions of the plaintiffs, repelled, as we submit, by the natural meaning of the language used by the testator, derive any support from authority; on the contrary, the commentators on the right of accretion in legacies and the adjudicated cases are distinctly against the plaintiffs' position. The commentators treat of the very effect of the words, "to be divided equally between them," following the legacy of the totality, in the form of the will in question here. The decision of the commentators is, that those words do not accomplish an assignment of parts, as the plaintiffs attempt to maintain. It is to be observed, that the article 1044 of the Napoleon Code, on which the authors whom we shall refer to, comment, is the counterpart of article 1707 of the Louisiana Code.

Merlin puts the case thus: He says, suppose the testator has said, I will to Peter and to Paul the immovable to be divided between them by equal portions, and if one of the legatees dies before me, I will his portion to his children, if any he leaves. In this case, the author asks whether accretion takes place either as between the two legatees if one dies before the testator without leaving children, or as between one of the legatees and the children, if either likewise die before the testator. And the author adds, that accretion does take place,

because the words to be divided equally between them are not in the disposition, but only in the mode of execution, and there is no assignment of parts. 1 Merlin, verbo accroissment, page 115.

Troplong, one of the most accurate of the French commentators, states the law thus: But caution must be observed against recognizing an assignment of parts in enunciations by the testator which serve him for the purpose of expressing simply the consequences of a partition which intervenes of right between the legatees, without the testator having the thought of fixing the determinate parts, and the author illustrates the very case of this will, thus: Caius gives to Primus Secundus and Tertius his "funds cornelien," to be enjoyed in "equal portions." The author says, here there is no assignment of parts in the sense of article 1044 of the Napoleon Code, which corresponds with the article 1707 of our Revised Civil Code. We submit, it is entirely reasonable to hold that the words to be divided equally between them annexed to a disposition of the totality in favor of two persons, does refer only to the execution of the legacy as between the legatees, and is not an assignment of the part of each in the disposition itself. With great pertinence the author adds, the testator, by the words, "pour en jouir par egales portions," i. e., to be enjoyed by them in equal portions, has only expressed the natural effect of a partition between the legatees. The author proceeds, if, in the example cited, Tertius dies before the testator, Primus and Secun-

dus, in receiving the legacy between them, in place of dividing it between three, possess it not the less in equal portions, and the intention of the testator is not defeated, but there will be conformity between his will and the execution of it; in one word, the clause of the will is but the enunciation of the concurrence of the legatees, and does not prevent conjunction and solidity. See 3d Troplong on Donations and Testaments, pages 684–5.

Mr. Demolombe, to whom plaintiffs allude in their brief, discusses the effect of a legacy worded similarly to this. He states that some have maintained such a legacy would not give rise to accretion,—others, that it would; and he refers to a third opinion, in the examination of which he discloses his own view. In examining this third opinion. he prefaces the discussion of the subject with the question, "Is the assignment of parts pure and simple." He replies, "accretion is impossible." It is manifest that Mr. Demolombe only aims, by the terse inquiry and its immediate answer, to distinctly convey the idea that where there is an assignment of parts, i. e., the separate shares of each legatee, there can be no accretion. This is of course elementary; it is nothing more than what is implied in the article of the Louisiana Code and article 1044 of the Napoleon Code; and Mr. Demolombe in announcing that accretion is impossible in such a case, unfolds nothing new. His announcement of the general principle. that the pure and simple assignment of the parts of legatees prevents accretion, surely does not, as the plaintiffs seem to suppose, touch the question here,

which is, whether there is any assignment of parts in this legacy, or whether it is not a distinct legacy to the legatees, not by shares or parts, but as a totality to each.

But Mr. Demolombe goes further. If, he remarks, the assignment of parts is not pure and simple, but accompanied with other clauses, the question whether the other clauses destroy the effect of the assignment becomes one of interpretation, to be solved by reference to the significance of the clauses of the legacy and the place they occupy in the grammatical construction of the sentence. It is thus apparent that, in the view of this commentator, even an assignment of parts in a legacy, unless pure and simple, may be destroyed by the other expression used by the testator. Can it be pretended here that a will whose leading sentence is a distinct bequest of the totality to each legatee, presents a "pure and simple assignment of parts," because it concludes, "to be divided equally between them?"—a conclusion, we submit, which only expresses the necessary implication, from the disposition of the totality which precedes it.

Mr. Demolombe, after laying down the rule of interpretation, that to determine the character of the legacy, and whether or not it presents an assignment of parts, the whole language containing the legacy must be construed with due regard to the significance of the different clauses and the grammatical construction of the sentence, adds: "Nous croyons qui cette doctrine est la plus vraie;" and this is the correct doctrine, announced by Mr. Demolombe, which the plaintiffs appear to think aids their

pretensions. (Plaintiffs' Brief, page 22.) But we submit that the rule of interpretation commended by Mr. Demolombe, that the natural sense of the whole sentence containing the legacy is to be considered, is the precise mode of construction that demonstrates that the words "to be divided equally between them," in this legacy, do not bear the meaning for which the plaintiffs contend; and that the plain significance of all the parts of the legacy is, that it is conjoint, not by distinct shares, but a totality to each of the legatees. The French authors all point to the obvious significance, resulting from its position in the sentence and the purpose for which it is introduced, of the clause in the will supposed to import a division of the interests of the legatees. Such words, they maintain, do not amount to an assignment of parts, when they are introduced merely to express that a thing bequeathed as an entirety to several, is subject to a division as between themselves. This distinction is founded in reason, fixed in their jurisprudence, and we have seen that Demolombe concurs with Troplong with reference to the meaning attached to such words, as affected by their position in the sentence.

These extracts might be extended to Duranton, Toullier and others. There is no substantial difference in the views they hold on this question. Demolombe and Marcade maintain that the question is one of interpretation, which should be based upon the words of the legacy, the order and significance of the sentences, and the whole

language of the will, which qualification, admitted to its fullest extent, does not, as the plaintiffs seem to suppose, manifest any material difference from the views of the other French commentators. We submit that the result of the French authorities is, that the legacy in question here contains no assignment of parts, but is conjoint, and gives rise to accretion.

The jurisprudence of France is moreover settled by the decisions of its highest tribunal, the Court of Cassation, in accordance with the views of Troplong, Toullier, Duranton, and others to whom allusion has been made. The decisions of that Court are brought down in "Sirey's Annotated Civil Code and its Supplement," to a very recent period, and there are a series of decisions reported affirming the conjoint character and the incidental right of accretion in a legacy worded like the one here. These decisions are as follows:

"When the testator, by one and the same disposition, institutes several persons as legatees of all his property, for them to *receive and enjoy it by equal portions*, there is no assignment of the part of each legatee in the thing bequeathed. In consequence, there is accretion."

Judgment of Court of Cassation 19th October, 1808, cited in Sirey's Code Annotes brought down to 1851, page 470, No. 15.

"When one disposition is made to two persons, *to be by them enjoyed and disposed of by equal portions*, it cannot be said that the testator has assigned the parts of the

legatees. It is a conjoint legacy, giving rise to accretion."

Judgment Court of Cassation, 14th March, 1815.

Ibid. page 470, No. 16.

In the same manner, after having made by one conjunctive disposition, a legacy to certain branches of heirs, the testator adds immediately, that the property bequeathed shall be divided into three equal lots, one of which is to go to each of said branches, there is not in this last clause any alteration of the first disposition, that is a division of the legacy and an assignment of parts to each branch. In case the members of one branch die before the testator, accretion takes place to the advantage of the other branches.

Judgment Court of Cassation, 18th December, 1832.

Ibid., page 262, No. 47.

When after making by one disposition a conjunctive legacy to two legatees, the testator adds, to be by them enjoyed in full property *by equal parts and portions*, there is not in this last clause any assignment of parts to each of the legatees, but only the indication of the result contemplated by the conjoint disposition; hence, in case of the death before the testator of one of the legatees, accretion takes place for the benefit of the other.

Judgment Court of Cassation, 9th March, 1857, cited in Supplement to Sirey Code Annotes, brought down to 1871, page 205, No. 5.

There are several decisions of the Courts of France inferior to the Court of Cassation, and collected in Sirey Codes Annotes, which hold the same doctrine, while there

are also decisions of these inferior Courts that are the other way. But the decisions of the Court of Cassation which we present must be accepted as determining the question in defendant's favor.

We have gone into the French authorities before bringing to the notice of the Court the authorities of our own Supreme Court. The question in this case has arisen twice and been twice decided by our Supreme Court. In the early case of Parkison vs. McDonough, 4th Martin's New Series, page 246, the Court passed upon the effect of the identical words, "to be equally divided between them," used in the will in this case, and following, as here, the disposition in favor of the legatees. The Court held it was a conjoint legacy and gave rise to accretion in favor of the legatees living at the date of the death of the testator, others of the legatees having died before. It is a considered case. Its authority is not weakened, because it is placed upon the authority of Mr. Toullier, one of the eminent French commentators quoted in this brief. It is the strongest evidence of the value of Toullier as an authority, that the Supreme Court of Louisiana followed him in its decision; nor is Mr. Toullier as an authority at all weakened by Mr. Demolombe or Marcade, as we have shown. He is certainly supported by other elementary writers, by the decrees of the Court of Cassation, and his views on this question were adhered to by the Supreme Court of this State in 1855, when the question again arose in Labeau vs. Trudeau, referred to hereafter. The case in 4th Martin was carefully considered, and as

the Court says, in the opinion delivered, the authorities derived from the Civil Law, as well as from other sources, were brought to its notice. The case was upon one side submitted, and on the other argued fully. The Court that pronounced that opinion would have ranked as an able tribunal in any country, in part evidenced by the fact that some of its opinions, remarkable for the force and research they display, find a place in Mr. Justice Story's Conflict of Laws (Ed. 1842, page 319), and are commended by that eminent jurist. The decision in Parkison's case is authoritative and decisive of the question in this case.

The decision in the case last cited was followed by the Supreme Court of Louisiana, in the case of Lebeau vs. Trudeau, 10th Louisiana Annual Reports page 165. The language of the legacy in that case was, "After my debts are paid my property shall be *divided in equl portions among the persons hereinafter named*—L. L., P. B., J. W., E. B, J. B., E. W., L. G., L. H. T."—language identical in substance and almost *verbatim* with the legacy here. The decision was that accretion took place between the legatees. It was contended that accretion did not take place because of the words "shall be divided in equal portions." But the Court decided otherwise, that the bequest was of the totality. The Court, through Chief Justice Slidell, held the following language:

"Now, here the legacy is made by one and the same disposition. Is it made without the testator's having assigned the part of each co-legatee in the thing bequeathed? I think it is.

"The assigning of the parts of each co-legatee means something more than is comprehended in the language of this will, which, according to my understanding of it, simply directs their participation of his whole estate in equal portions. I apprehend the terms used in the Code contemplate an express specification and assignment of the respective portions of the legatees, calling each to his particular part. But in the present case there is not that specific and distinct assignment of the parts which in my judgment is necessary to constitute a distinct legacy to each, of a distinct portion of the deceased's fortune. He appears to me, on the contrary, to have called them conjointly to partake equally in the totality of his estate, and has mentioned the equality of their portions for the purpose of regulating the distribution of that totality. They are conjointly his universal legatees."

The plaintiff's comment on the Lebeau decision is, that the will there contained these expressions, "Wishing to make known the persons to whom I bequeath my property," with which the testator commences the will, and "I have heretofore mentioned the persons to whom I bequeath all my property. (The testator had not used the word 'all' in the dispositive part.) These are my last testamentary dispositions. I will that they be respected," with which he concludes the will. Undoubtedly, the Court looked at the whole will. If there had been any expressions in the will which militated against the conjoint character of the legacy, such expressions would have had weight. There can be no objection to such a test, in this

case. The will in question here, presents a legacy if anything more strongly expressive of the legacy made conjointly. We submit that upon a survey of the whole will here, there is nothing whatever to detract from the significance of the legacy, and it must have effect according to its plain meaning and under the rule of construction applied in Lebeau's case. The plaintiffs observe that the expressions above quoted from Lebeau's will are not contained in the will of Story. But surely in his will, all the significance that can possibly be attached to the disconnected expressions in Lebeau's will, is concentrated and tersely expressed in the language, "I will to Henry and Benjamin *all* properties I die possessed of, to be divided equally between them." In Lebeau's case, the Court inferred that the testator meant no one else than the legatees were to participate in his estate. There is certainly the same, if not a stronger basis for the same conclusion here, for the will of Story is not redundant, but in one succinct sentence the testator names the persons to whom he bequeaths his property, and declares he gives it *all* to them.

There was a dissenting opinion in Lebeau's case, but when it is analyzed, it does not lessen the authoritative force of the decision. The dissenting judges were influenced by the circumstance that the words "shall be divided," occurred in the dispositive part of the legacy, and did not follow the disposition of the totality, as they do in this will. The dissenting judges regarded the will in this particular, as different from the frame of the legacy rec-

ognized by Toullier, as giving rise to accretion. See dissenting opinion, 10th Annual, page 168. The legacy in this case meets the tests of the right of accretion applied by Toullier and the Court of Cassation. The plaintiffs further observe, that the bequest in the Lebeau case was to a class. We do not appreciate the force of this. They were joined in the will as legatees—just as the two legatees are joined here. The simple question is, whether they were joined as legatees with the right of accretion.

The plaintiffs introduce, in their brief, three decisions from other States. We take it that this question is to be decided by the Louisiana Code, the decision of our Supreme Court, and the authorities peculiar to our jurisprudence. We forbear a critical examination of these decisions cited by plaintiffs, nor do we deem it important to contrast the language, "I give and bequeath my property to be equally divided between certain persons, share and share alike," and similar expressions used in those cases, with the legacy of the totality made here.

We submit that, tested according to its natural significance, and according to the Louisiana law, the decisions of our Supreme Court, the elementary writers upon our system of law, and the decisions of the Court of Cassation in France, based upon article 1044 of the Napoleon Code, identical with article 1707 of the Louisiana Code, the legacy here, in the language of our Code, is made conjointly without the testator's having assigned the parts of the legatees in the thing bequeathed, that it gives rise to accretion; and the decision of the Circuit Court should be

affirmed. We have no fear that this Court will deem the articles of our Code to be "of no more force than if they were not in the Code" (Plaintiffs' brief, page 7); nor do we apprehend that if in the opinion of this tribunal the decisions of the highest Court in Louisiana on this question of local law are against the plaintiffs, that your Honors will feel at liberty to adopt the plaintiffs' other suggestion, and disregard those decisions. That the question depends upon the Civil Law, and on that alone, is manifest; and as a question of that character, we submit it is to be deemed settled in our jurisprudence and in the jurisprudence of that country from which our Civil Code is immediately derived. What this tribunal does with questions of local law, construed by local tribunals, it is unnecessary to dwell upon.

It is not at all important, except in answer to the plaintiffs' view in this regard, to observe that, if Norman Story could be deemed to have died intestate for any part of his estate, the result would be that Benjamin S. Story, his brother, would take one-half under the will and share the intestate portion with the legal kindred, Benjamin taking one-third of that portion in addition to his testamentary half. The plaintiffs maintain the distribution would be otherwise, but we are persuaded the contingency requiring the decision of that question will not arise, as the will, with the right of accretion, confers on defendant the whole property.

Lastly, as to the Error assigned that the Court erred in excluding the evidence offered by plaintiff.

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It is not at all important, except in answer to the plaintiffs' view in this regard, to observe that, if Norman Story could be deemed to have died intestate for any part of his estate, the result would be that Benjamin S. Story, his brother, would take one-half under the will and share the intestate portion with the legal kindred, Benjamin taking one-third of that portion in addition to his testamentary half.* The plaintiffs maintain the distribution would be otherwise, but we are persuaded the contingency requiring the decision of that question will not arise, as the will, with the right of accretion, confers on defendant the whole property.

Lastly, as to the Error assigned that the Court erred in excluding the evidence offered by plaintiff.

* Civil Code Arts. 1058, 1059, 1548

The will is clear and unambiguous. There is no doubt or obscurity in any of its clauses, taken separately or together. Either it is made conjointly, with right of accretion, according to article 1707 of the Civil Code, or it is not. This question is to be determined by the language of the will. It is only where there is an ambiguity or obscurity in the testator's language that evidence *aliunde* can be offered. This is clear under our law, as it is of general application, "*Cum in verbis nulla ambiguitas est, non debet admitti voluntatis quaesta.*" In the language of the Supreme Court of Louisiana, "There cannot be a truer position than that under which courts are directed in the construction or interpretation of wills, to be guided by the intention of the testator. This intention must be sought in the words which he has used in his will. It is not to be sought *aliunde.*" Theall vs. Theall et als. 7th Louisiana Reports, page 230; Perry vs. Christmas, 7th Louisiana Reports, page 497; ibid, page 146; 1st Greenleaf on Evidence, S. 289.

Courts cannot make wills. They cannot assume what influence upon the testator's mind was exerted by the relationship in which he stood to others, and from that assumption attribute to the testator, and carry out an intention which he has not expressed. All that the evidence excluded proposed to show, was these relations in which the testator stood, and the pecuniary condition of his kindred. There is no warrant for the admission of such evidence, nor for the testimony excluded, which it is claimed, would show that Benjamin S. Story, since the testator's death,

has agreed, with some of the nephews of the deceased, to give them a share of the property. Surely such evidence has no pertinence or connection with the subject of controversy. The ruling of the Circuit Court in excluding the testimony was manifestly correct.

Respectfully submitted.

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